[fol. 19] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 17879 Criminal

UNITED STATES OF AMERICA

vs.

JOHN SOKOL

X

ORDER DISMISSING INDICTMENT—Filed March 18, 1955

Before GANEY, J.:

And Now, to wit: March 18th, 1955, in accordance with the Opinion of the Court allowing defendant's motion to dismiss, it is Ordered that the Indictment in the above action be and the same is hereby Dismissed for lack of jurisdiction.

(S.) J. Cullen Ganey, J.

[fols. 20-25] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 17804 Criminal

UNITED STATES OF AMERICA

vs.

PAUL DEEMER JOHNSTON

XI

ORDER DISMISSING INDICTMENT—Filed March 18, 1955

Before GANEY, J.:

And Now, to wit: March 18th, 1955, in accordance with the Opinion of the Court allowing defendant's motion to dismiss, it is Ordered that the Indictment in the above action be and the same is hereby Dismissed for lack of jurisdiction.

(S.) J. Cullen Ganey, J.

[fol. 26] [File endorsement omitted]

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,620

UNITED STATES OF AMERICA, Appellant,

v.

PAUL DEEMER JOHNSTON

No. 11,621

UNITED STATES OF AMERICA, Appellant,

v.

JOHN SOKOL

Appeals from the United States District Court for the Eastern District of Pennsylvania

Argued November 2, 1955

Before Goodrich, Staley and Hastie, Circuit Judges

OPINION OF THE COURT—Filed December 1, 1955

By GOODRICH, Circuit Judge:

These two cases raise the question of the proper venue in a prosecution for disobedience of the provisions of the Universal Military Training and Service Act.[1] The facts [fol. 27] are simple and undisputed. The two defendants registered in accordance with the draft law and were classified I-O. Each was directed by his local board to appear before the board to be assigned to "Civilian work contributing to the maintenance of the national health, safety, or interest . . ."[2] Each appeared before his local board in accordance with the instructions received in SSS

[1] 62 Stat. 604 (1948), *as amended*, 50 U. S. C. App. § 451-473 (1952).

[2] 65 Stat. 86 (1951), 50 U. S. C. App., § 456(j) (1952).

Form No. 153. Sokol was assigned to hospital work at Philadelphia State Hospital, Philadelphia, Pennsylvania, and Johnston to the Norristown State Hospital, Norristown, Pennsylvania. Both hospitals are located in the eastern district of Pennsylvania. Each told his local board that he would not obey the order of assignment and each never entered the eastern district to do the work assigned. Both at all times resided in the western district of Pennsylvania and their local boards were located in this district. Both registrants were indicted in the eastern district of Pennsylvania. The district court dismissed each indictment for lack of "venue-jurisdiction."[3]

Our first problem is to find out just what offense these men are charged with. The indictments each refer to title 50 U. S. C. App. sections 456 and 462. The Sokol indictment refers more particularly to section 456(j). The references to these two sections of the statute appear both at the head and in the body of the indictments. Section 456(j) has as its subject matter the treatment of those who by reason of religious training and belief are conscientiously opposed to participation in war. Provision is made for the manner in which this claim shall be presented. There appears in the section the authorization to the board to assign a registrant found to be conscientiously opposed even to noncombatant service to work of national importance. It states that one who "knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of [fol. 28] section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title."[4]

In section 462 (section 12 of the act) the conduct which is, among others, subject to sanction, is in any manner to "knowingly fail or neglect or refuse to perform any duty required of him under . . . this title . . . ."[5]

It will be noted that paragraph (j) above quoted carries the words "fails or neglects." Section 462 adds the word

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[3] United States v. Johnston, 131 F. Supp. 955 (E. D. Pa. 1955).

[4] 65 Stat. 86 (1951), 50 U. S. C. App. § 456(j) (1952).

[5] 62 Stat. 622 (1948), 50 U. S. C. App. § 462(a) (1952).

"refuses." Did these registrants "refuse" to obey orders in the western district in such way as to make them responsible for violation of the statute under section 462? It is agreed that they there stated to their respective boards that they were not going to obey their assignment for service. We do not need to answer the question just stated because the defendants are not being prosecuted in the western district for their defiance of the board. They are indicted, instead, in the eastern district. It was in the eastern district where they failed to appear to do the work assigned to them. And it is this failure which constitutes the offense, if any, in the eastern district. Do the indictments charge this offense?

As to Sokol the answer is clear. He was indicted for neglecting "to perform a duty . . . in that he failed to report to the . . ." assigned hospital. Johnston, on the other hand, was charged with neglecting "to perform a duty . . . in that he failed and refused to obey an order . . . directing him to report . . ." at the place of assignment. As we construe this indictment, it charges Johnston with, among other things, failing to report to the specified hospital as ordered. That part of the indictment which charges him with possible offenses other than failing to report can be disregarded as surplusage.[6]

It is apparent that the failure to report to the place of assignment is an indictable offense under the act. Section [fol. 29] 462 makes it an offense to fail to perform a duty imposed by authority of the statute. Section 456(j) poses no obstacles. Indeed it raises the board's order to report to the level of a duty under section 462, at least to the extent that "failure" or "neglect" to obey the order is considered to be a violation of such a duty. On the other hand, we do not believe that the Sokol indictment is inadequate in that the board's order is not mentioned. The duty it created is. But where is the offense of failure to report consummated?

Now we have reached the interesting substantive question of criminal law. It is well established that one does not have to be physically present in a state to be guilty of

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[6] Cf. Ford v. United States, 273 U.S. 593, 602 (1927).

a criminal offense there. The standard illustration, familiar to every law student, is that of shooting across a state boundary line and hitting a victim in the second state. The offense is complete where the fatal force hits the victim and the defendant may be prosecuted for homicide there if jurisdiction can be obtained over his person.[7] The same theory has been applied in both torts and crimes with regard to dissemination of defamatory words,[8] the loss sustained to one who relies upon false representations given to him by another from another state,[9] the injury resulting when canned food imported and distributed from one state causes harm in another,[10] and the attempt by letter mailed in one state to induce a public employee in another to violate his official duties.[11]

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[7] State v. Hall, 114 N.C. 909, 19 S.E. 602 (1894); United States v. Davis, 25 Fed. Cas. 786, No. 14, 932 (1st Cir. 1837); see also Restatement Conflict of Laws, Note § 377, ill. 1 at 456 (1934) (same principle applicable in torts).

[8] *Torts:* Restatement, Conflict of Laws, Note § 377, ill. 7 at 457 (1934). *Crimes:* Sachs v. Government of the Canal Zone, 176 F.2d 292, 297 (5th Cir. 1949); State v. Piver, 74 Wash. 96, 132 P. 858 (1913).

[9] *Torts:* Restatement, Conflict of Laws, Note § 377, ill. 5, 6 at 457 (1934). *Crimes:* Updike v. People, 92 Col. 125, 18 P.2d 472 (1933); State v. Devot, 66 Utah 319, 242 P. 395 (1925); *but see* Commonwealth v. Schmunk, 22 Pa. Sup. 348 (1903), *affirmed*, 207 Pa. 544, 56 A. 1088 (1904). The conflict in the crimes cases stems from the fact that the substantive offense requires proof of the receipt, and not merely the loss, of property.

[10] *Torts:* Hunter v. Derby Foods, Inc., 110 F.2d 970 (2nd Cir. 1940).

[11] *Crimes:* In re Palliser, 136 U.S. 257 (1890). Referring to U. S. Const. art. III, § 2, cl. 3 and U. S. Const. amend. VI, the Court said that "the right thereby secured is not a right to be tried in the district where the accused resides, or even in the district in which he is personally at the time of committing the crime, but in the district 'wherein the crime shall have been committed.'" (*Id.* at 265).

[fol. 30] These defendants, however, did no act nor did they follow any course of conduct in the eastern district of Pennsylvania. What is being complained of is their failure to do, not what they did. This case raises the point left unanswered in *United States* v. *Anderson*, 328 U.S. 699, 706 (1946). But we think the answer is pretty clear on the basis of established legal rules applicable to other cases of omissions which have been made crimes. It is true, and no one disputes, that the Constitution (Sixth Amendment) requires that a person shall be tried in a district where the crime shall have been committed.[12] But it is also clear that where there is a legal duty to act and the failure to do that act is a criminal offense, the courts consider the criminal offense to take place where the defendant failed to perform that which the law required of him. This is illustrated by a variety of decisions in different fact situations. Here are some of the instances: the failure of an individual doing business in one county to surrender himself at a district court in another in response to a fiat in bankruptcy,[13] the neglect of a father residing in one county to support his children residing in another,[14] the failure of a witness to appear before a legislative committee in obedience to a summons,[15] the failure to file necessary reports with the appropriate governmental authorities in the District of Columbia concerning (1) the custody of enemy property and the indebtedness of alien enemies,[16] (2) an alien woman[17] and (3) rates and charges of a railroad,[18]

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[12] *Ibid.*

[13] Regina v. Milner, 2 Car. & K. 309, 175 Eng. Rep. 128 (1846).

[14] State v. Peabody, 25 R.I. 544, 56 A. 1028 (1904); State v. Yocum, 182 Ind. 478, 106 N.E. 705 (1914).

[15] State v. Brewster, 87 N.J.L. 75, 93 A. 189 (1915).

[16] Rumely v. McCarthy, 250 U.S. 283 (1919).

[17] United States v. Lombardo, 241 U.S. 73 (1916).

[18] New York Cent. & H. R. R. Co. v. United States, 166 F. 267 (2nd Cir. 1908).

[fol. 31] and the failure to file tax returns with the Collector in the appropriate internal revenue district.[19]

We see no reason why this well established line of authority should not be applied in these selective service cases. We think what is being prosecuted here is the failure of these defendants to do what the law required them to do. Suppose these young men, after defying the local board in their respective communities, had within the period allotted for travel changed their minds and reported for their hospital duty at the places assigned on the given day. There certainly would be no offense of failure to report committed. Whether a crime or not, the prior refusal would not prevent compliance. Likewise in the case before us the prior refusal was neither the failure to report nor did it preclude the possibility of committing this offense. We think it clear that here this offense was committed at the time and place the act should have been performed. Such a viw has been expressed by federal courts applying the draft law.[20]

There is one further point which has to do with the Criminal Appeals Act, 18 U.S.C. § 3731 (1952). By that statute an appeal may be taken on behalf of the United States to the Supreme Court of the United States from a judgment of a district court dismissing an indictment where the judgment "is based upon the invalidity or construction of the statute upon which the indictment . . . is

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[19] Bowles v. United States, 73 F.2d 772, 774 (4th Cir. 1934), *cert. denied*, 294 U.S. 710 (1935); United States v. Commerford, 64 F.2d 28, 32 (2nd Cir.), *cert. denied*, 289 U.S. 759 (1933).

[20] United States v. Van Den Berg, 139 F.2d 654, 656 (7th Cir. 1944); Humes v. Pescor, 148 F.2d 127, 128 (8th Cir. 1945); Jones v. Pescor, 169 F.2d 853, 855 (8th Cir. 1948); United States v. Sutter, 127 F. Supp. 109, 115 (S.D. Cal. 1954); *contra* United States v. Patterson, 132 F. Supp. 67 (D. Kan. 1955); United States v. Chiarito, 69 F. Supp. 317, 322 (D. Ore. 1946) (alternative holding). Penor v. United States, 167 F. 2d 553 (9th Cir. 1948) is not in point. There the crime charged was desertion of the original camp rather than failure to report to the one newly assigned.

founded." By the same section of the code an appeal may be taken by the United States to a court of appeals from a judgment of a district court setting aside or dismissing [fol. 32] any indictment "except where a direct appeal to the Supreme Court of the United States is provided . . ." Under the statute, then, we do not have authority to hear the appeal if it is one which is appealable directly to the Supreme Court.

In *United States* v. *Jones*, 345 U.S. 377 (1953), the Court sent back to a court of appeals a case where appeal had been taken directly to the Supreme Court and where, in the view of that Court, there was a question of examining and construing the information. This the Supreme Court said was not properly a question for it but for the court of appeals instead. We think that case governs this. As set out above, there is a question of construing the indictments in this case to see what is being charged. And the only statutory question is whether such charges can be brought under the act, a question primarily involving the adequacy of the indictment rather than the construction of the statute. The case is, therefore, a proper one for consideration at this level and this consideration we have endeavored to give it.

The judgment of the district court will be reversed and the case remanded.

[fol. 33] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,620

UNITED STATES OF AMERICA, APPELLANT,

vs.

PAUL DEEMER JOHNSTON

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: Goodrich, Stanley and Hastie, Circuit Judges.

JUDGMENT—December 1, 1955

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the case remanded to the United States District Court for the Eastern District of Pennsylvania.

Attest:

December 1, 1955.

Ida O. Creskoff, Clerk.

[File endorsement omitted.]

[fols. 34-40] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,621

UNITED STATES OF AMERICA, Appellant,

vs.

JOHN SOKOL

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: Goodrich, Staley and Hastie, Circuit Judges.

JUDGMENT—December 1, 1955

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the case remanded to the United States District Court for the Eastern District of Pennsylvania.

Attest:

Ida O. Creskoff, Clerk.

December 1, 1955.

[File endorsement omitted.]

[fol. 41] Petition for Rehearing Covering 17 Pages, Filed —Omitted from This Print. It Was Denied, and Nothing More by Order.

[fols. 42-52] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ORDER SUR PETITION FOR REHEARING—January 4, 1956

Present: Goodrich, Staley and Hastie, Circuit Judges.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court, Herbert F. Goodrich.

Dated: January 4, 1956.

[File endorsement omitted.]

[fol. 53] Clerk's Certificate to foregoing trnscript omitted in printing.

[fol. 54] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 5, 1956.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

TRANSCRIPT

OF

RECORD

LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 704

UNITED STATES OF AMERICA, PETITIONER,

vs.

DUDLEY A. PATTESON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 17, 1956

CERTIORARI GRANTED MARCH 5, 1956

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 704

UNITED STATES OF AMERICA, PETITIONER,

vs.

DUDLEY A. PATTESON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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1 In the District Court of the United States for the District of Kansas

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

DUDLEY A. PATTERSON, DEFENDANT.

No. 9391, Criminal.

INDICTMENT.—Filed October 7, 1954

The Grand Jury charges:

On or about July 26, 1954, in the District of Kansas and within the jurisdiction of this court, Dudley A. Patterson being a male citizen of the United States and required to register under the Universal Military Training and Service Act, and the amendments thereto, the Proclamation of the President of the United States and the rules, regulations and directions given thereunder, prescribe and executed *pursuant* to such Act as aforesaid, he having registered with Local Board No. 57 for *Oklahoma* County, Oklahoma, and having been classified by said Board I-O, and the said Board having issued an order, duly mailed to him, for the said Dudley A. Patterson ordering him to report on July 26, 1954, for civilian work contributing to the maintenance of the national health, safety and interest as the said Board deemed appropriate, and he, the said Dudley A. Patterson, did knowingly and willfully refuse, neglect and fail to report at the Topeka State Hospital at the time and place so designated in said order,

A True Bill.

W. LAIRD DEAN,
Foreman.

SELBY S. SOWARD,
Assistant United States Attorney.

4 Bond fixed at $1500.00.
DELMAS C. HILL,
Judge.

2 In United States District Court for the District of Kansas

[Title omitted]

ORDER TRANSFERRING CASE TO U.S.D.C., WESTERN OKLAHOMA—Filed March 22, 1955

Now on this 21st day of March, 1955, this matter comes regularly on for hearing before the Honorable Arthur J. Mellott, Chief Judge of the United States District Court for the District of Kansas. The defendant is present in person and the United States is represented by Selby S. Soward, Assistant United States Attorney for the District of Kansas.

Thereupon and before arraignment or other proceedings are had in this matter it is shown to the court that the defendant herein is a resident of Oklahoma City, Oklahoma and is registered with the Local Draft Board for Oklahoma County.

The court thereupon sua sponte orders this case transferred to the Western District of Oklahoma for trial under the provisions of Rule 21(b) of the Federal Rules of Criminal Procedure.

It is therefore by the Court ordered that this case be transferred to the Western District of Oklahoma for trial.

It is further ordered that the pleadings in this matter on file in the office of the Clerk of the District Court for the District of Kansas or certified copies thereof be transferred to the Clerk of the United States District Court for the Western District of Oklahoma at Oklahoma City.

It is further ordered that the defendant Dudley A. Patterson be released so far as his present bond is concerned and that his bond for his appearance in this court be cancelled, set aside and held for naught, and that the defendant report to the Clerk of the United States District Court for the Western District of Oklahoma on March 28, 1955, at Oklahoma City, Oklahoma, there to give a new bond for his appearance before that court in accordance with the rules and practice required by said court.

ARTHUR J. MELLOTT,
Judge.

Approved as to Form, Selby S. Soward, Assistant U.S. Attorney, Attorney for Plaintiff.

3 In United States District Court for the Western District of Oklahoma

[Title omitted]

ORDER RE-TRANSFERRING CASE TO U.S.D.C., KANSAS—Filed April 27, 1955

This matter having come up on the 25th day of April, 1955, upon the application of Assistant United States Attorney, George Camp, for an order re-transferring this matter to the United States District Court for the District of Kansas and the Court having fully satisfied itself that the jurisdiction for this alleged offense lies solely in Kansas, and that the defendant cannot effectively waive the jurisdiction,

IT IS THEREFORE ORDERED by the Court that this matter be re-transferred to the United States District Court for the District of Kansas for further proceedings and that the Clerk for the Western District of Oklahoma is hereby directed to transfer his file from his office to the office of the Clerk of the United States District Court for the District of Kansas.

W. R. WALLACE,
United States District Judge.

In United States District Court for the District of Kansas

MOTION TO DISMISS INDICTMENT—Filed May 13, 1955.

May it please The COURT:

Now comes the defendant and moves the Court for an order to dismiss the indictment against the defendant for the reasons that the Court does not have venue and jurisdiction of the offense.

The defendant was indicted for knowingly failing to perform a duty imposed upon him under the Universal Military Training and Service Act. The defendant resides in Oklahoma City, which is within the jurisdiction of the United States District Court for the Western District of Oklahoma. He registered under the act with his local board in Oklahoma City. Throughout his entire processing he dealt only with the selective service officials in the State of Oklahoma. He was finally ordered by the Oklahoma City board to perform work at the Topeka State Hospital at Topeka, Kansas. He reported at his local in Oklahoma City and personally notified the board that he would refuse to accept such employment at the Topeka State Hospital. He never at any time reported at the Topeka State Hospital. He never left the State of Oklahoma or the Western District of Oklahoma to report for

the assigned work. The failure to perform the duty that constitutes the offense occurred in the State of Oklahoma. The refusal to report to the hospital was an act that was committed in the Western District of Oklahoma and not in the District of Kansas.

WHEREFORE the defendant prays that upon a consideration of this motion, the indictment be dismissed for lack of jurisdiction of this Court to prosecute the defendant.

DUDLEY A. PATTERSON,
By: HAYDEN C. COVINGTON,
Counsel for Defendant.

Filed with affidavit May 13, 1955.

AFFIDAVIT SUPPORTING MOTION TO DISMISS INDICTMENT

State of New York,
County of Kings, ss:

Hayden C. Covington, being duly sworn, deposes and says:

I am a member of the bars of the States of Texas and New York, of the Supreme Court of the United States and of all of the United States Courts of Appeals. I maintain my office at 124 Columbia Heights, Brooklyn 1, New York. I have been engaged to represent the defendant in this case.

The indictment in this case was originally returned in this district and the case was transferred properly by the Court to the Western District of Oklahoma. Recently the case was returned by order of the district court at Oklahoma City to this Court. The case has been placed upon the calendar for trial at the session of this Court beginning May 23, 1955, at Kansas City, Kansas.

All of the witnesses that will have to give testimony in this case reside in Oklahoma City. The defendant will be put unjustly to the expense and trouble of getting witnesses brought from Oklahoma City. He may not be able to get his witnesses and evidence ready in time for trial because of the distance and the fact that the witnesses all reside beyond the jurisdiction of this Court. It works a hardship on him to try the case in this Court because he will *pay* to pay travel fees and other expenses for the attendance of witnesses which will be prohibitive and make it impossible to prove his defenses.

The Court does not have jurisdiction of this offense. I have dictated the above and foregoing motion to dismiss the indictment. I have examined the record and the draft board file and I am familiar with all the facts. I state that the facts appearing above and in the motion to dismiss the indictment are true and correct.

I rely upon United States v. Johnston, Cr. No. 17804, decided by the United States District Court for the Eastern District of Pennsylvania, on March 17, 1955. I submit to the Court, accompanying this affidavit, the opinion of Judge Ganey in the Johnston case.

The defendant does not desire to have oral argument on the motion to dismiss the indictment. The Court is respectfully requested to receive the motion and determine it, based upon the motion, this affidavit and whatever papers and oral argument the United States Attorney desires to submit and make to the Court.

HAYDEN C. COVINGTON

Subscribed and sworn to before me this 10th day of May 1955.

WILLIAM K. JACKSON

United States District Court, Eastern District of Pennsylvania, Criminal No. 17,804, United States of America v. Paul Deemer Johnston. Criminal No. 17,879, United States of America v. John Sokol.

OPINION.

March 17, 1955.

GANEY, J.

Each of the defendants' motion to dismiss the indictment against him raises the troublesome question of venue-jurisdiction. Defendants were indicted for knowingly neglecting to perform a duty imposed upon them pursuant to the provisions of the Universal Military Training and Service Act of 1948, 62 Stat. 604, as amended, 50 U.S.C.A. Appendix, Sec. 451 et seq.

The defendant, Paul Deemer Johnston, resided in the Western District of Pennsylvania. He registered under the Act with his local draft board in that district, and *throughout* his selective proceedings he dealt only with selective service personnel there. He was finally given a I-O classification as a conscientious objector, which entitled him to perform two years of civilian work contributing to the national health in lieu of his being inducted into the armed forces. Subsequently the local board, in accordance with Selective Service regulations, notified him by mail in the western judicial district of Pennsylvania to report to it for the assignment of civilian work. He was instructed to report to the Norristown State Hospital located in the Eastern District of Pennsylvania, the judicial district of this court, on November 30, 1953.

6 At the time of the assignment, he personally notified the board of his refusal to accept such employment. He has not entered this district to report for the assigned work.

The story of the other defendant, John Sokol, is parallel to that of defendant Johnston.

On the assumption that when the omission to perform a duty constitutes a crime the venue is in the judicial district in which the duty should have been performed, the Government indicted the defendants in this district.[1]

Our problem, as in United States v. Anderson, 328 U.S. 699, 705 (1946), is to ascertain what duty it was, the failure to perform, that constituted the crime, and what acts of the defendants constituted the violation in order to determine where the crime was committed.

Clearly the duty in each case was to report to the State Hospital, the place of performance, in this judicial district. However we think the violation was the defendants' refusal to report to the place of performance. The refusal in both cases took place in the Western District of Pennsylvania, and not in this district where defendants were never physically present.[2] Penor v. United States, 9th Cir., 1948, 167 F. 2d 553, 555; United States v. Chiarito, D. C. Ore., 1946, 69 F. Supp. 317, 322-325.

Accordingly, the defendant's motion in each case to dismiss the indictment will be allowed for lack of jurisdiction.

In United States District Court for the District of Kansas

MEMORANDUM OPINION.—May 16, 1955

Mellott, Chief Judge: The issue before the court arises upon a motion to dismiss. The indictment charges that the defendant, having registered with Local Board No. 57 for Oklahoma County, Oklahoma, having been classified by that board I-O, and the board having issued an order for him to report on July 25, 1954 for civilian work contributing to the maintenance of national health, safety and interest, "did knowingly and willfully refuse, neglect and fail to report at the Topeka [Kansas] State Hospital at the time and place so designated in said order."

When the case came on for trial, after it had been shown to the court that the defendant was at all times in the State of Okla-

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[1] Cf. Footnote 14 on page 705 of United States v. Anderson, 328 U.S. 699 (1946).

[2] See footnote 11 on page 704 of United States v. Anderson, 328 U.S. 699, in which the Court pointed out that "the Department of Justice in 1942 had instructed United States Attorneys that, in cases of failure to report for induction, 'venue is in the district where the subject was ordered to report,' apparently without regard to whether he had been present physically there." (Italics supplied.)

homa, that the files were with the local board in that district, that it was the state and district of the residence of the defendant, and that the refusal to report at the time and place charged in the indictment had taken place in the Western District of Oklahoma, the court concluded that the venue lay in that district and sua sponte ordered the case transferred there for trial under the provisions of Rule 21 (b)[3] of the Federal Rules of Criminal Procedure.

After the file was transmitted to the United States District Court for the Western District of Oklahoma, one of the judges of that court signed an order re-transferring the case to this court for further proceedings and directing the clerk of that court "to transfer his file from his office to the office of the Clerk of the United States District Court for the District of Kansas."

In the motion to dismiss, subsequently filed in this court, it is alleged:

"The defendant was indicted for knowingly failing to perform a duty imposed upon him under the Universal Military Training and Service Act. The defendant resides in Oklahoma City, which is within the jurisdiction of the United States District Court for the Western District of Oklahoma. He registered under the act with his local board in Oklahoma City. Throughout his entire processing he dealt only with the selective service officials in the State of Oklahoma. He was finally ordered by the Okla-

8 homa City board to perform work at the Topeka State Hospital at Topeka, Kansas. He reported at his local board in Oklahoma City and personally notified the board that he would refuse to accept such employment at the Topeka State Hospital. He never at any time reported at the Topeka State Hospital. He never left the State of Oklahoma or the Western District of Oklahoma to report for the assigned work. The failure to perform the duty that constitutes the offense occurred in the State of Oklahoma. The refusal to report to the hospital was an act that was committed in the Western District of Oklahoma and not in the District of Kansas."

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[3] "Rule 21. Transfer from the District Division for Trial

* * *

"(b) Offense Committed in Two or More Districts or Divisions. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

Apparently, counsel for the United States does not controvert any of the basic facts. In a memorandum opposing the motion to dismiss it is stated:

"It is the position of the United States that jurisdiction of the offense alleged in this Indictment is in the District of Kansas. It is in this district that the work required would have been performed. Therefore the omission which constitutes the criminal act necessarily occurs in this district."

One of the cases cited in the memorandum supports the contention made. In United States v. Sutter (D.C. S.D. Calif.) 127 F. Supp. 109, 115, two registrants in the Northern District of California had been ordered to report to the Los Angeles County of Charities within the Southern District of California. It was held, apparently largely on the basis of language used in Jones v. Pescor (8 Cir.), 169 F. 2d 853, that venue lay in, and jurisdiction existed with, the District Court for the Southern District of California. Judge Ganey of the Eastern District of Pennsylvania, however, under facts essentially parallel—registrants in Western District ordered by board in that district to report to Norristown State Hospital located in the Eastern District—held that the indictments should be dismissed for lack of jurisdiction. United States v. Johnston, No. 17804, and Sokol, No. 17879, — F. Supp. —.

The latter view, this court believes, is the sounder. United States v. Anderson, 328 U.S. 699, 66 S. Ct. 1213, 90 L. Ed. 1529, cited in both opinions and in the memorandum filed by the United States here, did not decide the present question. It is still "necessary in order to decide where the crime is committed to ascertain what duty it was, the failure to perform which constitutes the crime, * * *." The duty of this defendant was to follow the order of the Oklahoma Board, given to him in Oklahoma, to report on July 25, 1954 for civilian work contributing to the maintenance of national health, safety and interest. His failure to do so constitutes the crime charged in the indictment.

Order is being entered sustaining the motion to dismiss the indictment.

9 Entered May 16, 1955

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

JUDGMENT—May 16, 1955

For the reasons set out in the memorandum opinion this date entered herein, it is now by the court

ORDERED that the motion to dismiss the indictment be, and it hereby is, sustained.

Dated at Kansas City, this 16th day of May, 1955.

ARTHUR J. MELLOTT,
Chief Judge.

Entered May 16, 1955.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

NOTICE OF APPEAL—Filed June 10, 1955

The plaintiff herein, United States of America, by Shelby S. Soward, Assistant United States Attorney for the District of Kansas, gives notice hereby that it appeals from the Order of this Court dated and entered May 16, 1955, directing that the Defendant's Motion to Dismiss the Indictment herein be sustained.

Dated this 10th day of June, 1955.

SELBY S. SOWARD,
Assistant United States Attorney,
Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

CONCISE STATEMENT OF POINT RELIED UPON—Filed June 30, 1955

The plaintiff herein contends the District Court erred in finding jurisdiction in this case did not lie in the district of Kansas and sustaining the defendant's Motion to Dismiss the Indictment.

SELBY S. SOWARD,
Assistant U. S. Attorney,
District of Kansas.

Filed with proof of service June 30, 1955.

10 Clerk's Certificate to foregoing transcript omitted in printing.

11 In United States Court of Appeals for the Tenth Circuit

[Caption omitted]

12 In United States Court of Appeals

ARGUMENT AND SUBMISSION—November 16, 1955

This cause came on to be heard and was argued by counsel, Selby S. Soward, Esquire, appearing for appellant, Hayden C. Covington, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

13 United States Court of Appeals, Tenth Circuit

No. 5193—November Term, 1955

UNITED STATES OF AMERICA, APPELLANT,

v.

DUDLEY A. PATTESON, APPELLEE

Appeal from the United States District Court for the District of Kansas

OPINION—January 19, 1956

Selby S. Soward (William C. Farmer, U. S. Attorney, was with him on the brief), for Appellant;

Hayden C. Covington, for Appellee.

Before MURRAH, and PICKETT, Circuit Judges, and RICE, District Judge.

PICKETT, Circuit Judge:

14 The question presented by this appeal is one of jurisdiction in a prosecution for violation of the provisions of the Universal Military Training and Service Act. (50 U.S.C.A. App. Sec. 451 et seq.) The defendant Patteson, a resident of Oklahoma City, Oklahoma, registered with the local Selective Service Board and was classified 1-O. This classification is one designated for those who are conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces of the United States. 50 U.S.C.A. App. Sec. 456(j). In lieu of induction, the local board ordered Patteson to report to it on July 26, 1954, to receive instructions for civilian work contributing to the maintenance of the national health, safety or interest at the Topeka State Hospital in Topeka, Kansas. In compliance with the order, he reported to the local board and there

notified the board that he would not proceed to Topeka for the performance of the required civilian work. He never left the State of Oklahoma.

On October 7, 1954, the defendant was indicted in the United States District Court for the District of Kansas for violation of 50 U.S.C.A. Sec. 462. The indictment charged that the defendant did knowingly and willfully refuse, neglect and fail to report to the Topeka Hospital as ordered by the local board. The District Court dismissed the indictment on the ground that the offense was not committed in Kansas. 132 F. Supp. 67. The United States has appealed.

Section 12 of the Act (59 U.S.C.A. Sec. 463(a)) provides
15 that any person "charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment." The Sixth Amendment to the Constitution of the United States requires that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial "by an impartial jury of the State and district wherein the crime shall have been committed, * * *." The question narrows itself to that of where was the crime committed. The United States argues that the order of the local board required Patteson to report at the Topeka Hospital; that his omission or failure to report there was the act which constituted the violation; and that the crime was committed in Kansas by this omission or failure. It relies upon decisions which uphold jurisdiction of prosecutions in the districts where a statute requires an act to be done.[4] Generally, these cases hold that when an omission or failure to act constitutes a crime, the jurisdiction of a prosecution for a violation is in the district where the act should have been performed, even though
16 the person charged was not physically present in that district at the time of the omission or failure. The third Circuit in United States v. Johnson, —— F.2d ——, adopted this analogy and held in a case similar to the one before this court that jurisdiction was at the place where the conscientious objector was ordered to report. We do not think that the offense was an

[4] See Rumely v. McCarthy, 250 U.S. 283; United States v. Lombardo, 241 U.S. 73; United States v. Commerford, 2 Cir., 64 F.2d 28, cert. den. 289 U.S. 759; N. Y. Central and H.R.R. Co. v. United States, 2 Cir., 166 F. 267; State v. Peabody, 25 R.I. 54, 56 Atl. 1028.

act of omission or an offense of misfeasance or malfeasance which would pass from one jurisdiction to another, but a refusal to take a positive step in the process of induction or assignment to civilian work and that this refusal was in Oklahoma.

As is pointed out in United States v. Anderson, 328 U.S. 699, "The constitutional specification is geographic; and the geography prescribed in the district or districts within which the offense is committed. This may or may not be the place where the defendant resides; where the draft board is located; or where the duty violated would be performed, if performed in full. The places of residence, of the draft board's location, of final and complete performance, all may be situated in districts different from that where the criminal act is done. When they so differ, it is the latter, not any of the former, which determines the jurisdiction." (Footnotes omitted).

So far as compliance with the requirements of the Act or the regulations is concerned, the conscientious objector is in no different position than any other person subject to its provisions.
17 Induction into the service is the end product of submission to the Selective Service process and compliance with the orders of the local board. Billings v. Truesdale, 321 U.S. 542. Induction is brought about by a continuous process of steps beginning with registration, and it ends when the registrant is accepted into the military service or enters into civilian work. A wilful refusal of those affected by the Act to take any one of the necessary steps constitutes a violation. Gibson v. United States, 329 U.S. 338; Billings v. Truesdale, supra; Falbo v. United States, 320 U.S. 549; Hudson v. United States, 10 Cir., 157 F.2d 782, cert. den. 329 U.S. 813; Shigeru Fujii v. United States, 10 Cir., 148 F.2d 298, cert. den. 325 U.S. 868; Berman v. United States, 9 Cir., 156 F.2d 377, cert. den. 329 U.S. 795.

Patteson had taken all the required steps in the process of induction up to compliance with the local board's order which required him to report to it for assignment to Topeka, Kansas for civilian work in lieu of induction into the armed forces. The duty required of him by the order was to proceed to Topeka. This was no more than a necessary intermediate step in the continuous process, the ultimate purpose of which was to get Patteson into civilian work. Falbo v. United States, supra. It seems to us quite clear that his refusal to take this step occurred when he notified his local board in Oklahoma that he would go no further. Had he proceeded to Topeka and then refused to do the assigned work, a separate offense would have been committed. Gibson v.
18 United States, supra; United States v. Anderson, supra. In Dodez v. United States, 329 U.S. 338, and Jeffries v. United States, 10 Cir., 169 F.2d 86, prosecutions were had in the district where the board was located when the registrants refused to report

for work of national importance after being ordered to do so, and the jurisdiction of the courts was not questioned.[5]

Jurisdiction as contended for by the United States might require a conscientious objector who refused to obey the local board's order to go to a distant state or territory of the United States, or even outside the continental limits of the United States, where he had never been, to defend a prosecution for an act, that is a refusal to proceed, which occurred in his home district. This, of course, would not determine jurisdiction if the crime was actually committed elsewhere, but as was said in United States v. Johnson, 323 U.S. 273, "Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must
19 be construed. If an enactment of Congress equally permits the underlying spirit of the Constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."

Affirmed.

20 In United States Court of Appeals

JUDGMENT—January 19, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

21 Clerk's Certificate to foregoing transcript omitted in printing.

---

[5] In the Jeffries Case, the court said:

"Clearly, the duty of Jeffries to report embraced more than putting in an appearance at the time and place designated in the order. It included a willingness to be assigned to work of national importance under civilian direction and to go to the camp to which he had been assigned.

"The appearance of Jeffries at the office of the Local Board at the time indicated in the order with the intent and purpose not to accept assignment to work of national importance and not to go to the camp to which he had been assigned was as much a non-compliance with the order as if he had not appeared at the office of the Local Board."

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 643

PAUL DEEMER JOHNSTON AND JOHN SOKOL,
PETITIONERS,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 31, 1956
CERTIORARI GRANTED MARCH 5, 1956

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 643

PAUL DEEMER JOHNSTON AND JOHN SOKOL,
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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,620

UNITED STATES OF AMERICA, Appellant,

v.

PAUL DEEMER JOHNSTON, Appellee

No. 11,621

UNITED STATES OF AMERICA, Appellant,

v.

JOHN SOKOL, Appellee

Joint Appendix

[fol. 2] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 17879

THE UNITED STATES

vs.

JOHN SOKOL

W. Wilson White, Esq.
Michael Hahalyak, Esq.
(403 Commonwealth Bldg.
Pittsburgh 22, Pa.)

DOCKET ENTRIES

1954

July 20. True Bill.
July 20. Motion and Order for Bench Warrant filed. Bench Warrant exit.

1954

Sept. 17. Bench Warrant returned by U. S. Commissioner, Pittsburgh, Penna., with transcript attached and filed.

Sept. 17. Bond of J. Sokol in $1,000 with surety filed.

[fol. 3] Nov. 5. Appearance of Michael Hahalyak, Esq., for defendant, filed.

Nov. 5. Plea: Not Guilty.

Nov. 5. Motion to dismiss indictment filed.

Dec. 20. Argued sur motion to dismiss, C. A. V.

1955

Mar. 15. Stipulation of counsel pertaining to venue filed.

Mar. 17. Opinion, Ganey, J., allowing motion to dismiss indictment for lack of jurisdiction filed. (=17804).

Mar. 18. Order of Court dismissing indictment filed. 3/21/55 Noted. (Copies mailed to counsel).

April 15. Government's Notice of Appeal filed.

April 15. Copy of Clerk's Notice to U. S. Court of Appeals (statement of docket entries) filed.

[fol. 4] In the United States District Court for the Eastern District of Pennsylvania

Criminal No. 17804

The United States

vs.

Paul Deemer Johnston

W. Wilson White, Esq.
Michael Hahalyak, Esq.
(403 Commonwealth Bldg.
Pittsburgh 22, Pa.)

Docket Entries

1954

May 25. True Bill.

June 23. Motion and Order for Bench Warrant filed. Bench Warrant exit.

1954

Aug. 26. Transcript of Commissioner's record received from Western District of Pennsylvania filed.

Aug. 26. Bond of defendant in $500.00 filed (cash security posted at Pittsburgh, Pa.)

[fol. 5] Nov. 5. Appearance of Michael Hahalyak, Esq., for defendant filed.

Nov. 5. Plea: Not Guilty.

Nov. 5. Motion to dismiss indictment filed.

Dec. 20. Argued sur motion to dismiss. CAV.

1955

Mar. 15. Stipulation pertaining to venue filed.

Mar. 17. Opinion, Ganey, J., allowing defendant's motion to dismiss for lack of jurisdiction filed.

Mar. 18. Order of Court dismissing Indictment filed. 3/21/55 Noted. (Copies mailed to counsel).

April 15. Government's Notice of Appeal filed.

April 15. Copy of Clerk's Statement of Docket Entries filed.

[fol. 6] In the United States District Court for the Eastern District of Pennsylvania

[Title omitted]

Indictment, Sokol Case—July 19, 1954

The Grand Jury Charges:

That on or about April 1, 1954, in the Eastern District of Pennsylvania, John Sokol, being a male person subject to the rules and regulations of the Selective Service Act of 1948, as amended by the Universal Military Training and Service Act and the rules and regulations made pursuant thereto, did knowingly neglect to perform a duty imposed upon him by the provisions of the said Act in [fol. 7] that he failed to report to the Philadelphia State Hospital, Roosevelt Boulevard and Southampton Road, Philadelphia, Pennsylvania, for assignment to perform civilian work contributing to the maintenance of the national

health, safety or interest, in lieu of induction; in violation of Title 50 Appx. Secs. 456(j) and 462.

True Bill.

E. Price Burnham, Foreman.

W. Wilson White, United States Attorney, by G. Clinton Fogwell, Assistant U. S. Attorney.

July 19, 1954.

[fol. 8] In the United States District Court, Eastern District of Pennsylvania

[Title omitted]

Indictment, Johnston Case

The Grand Jury C... rges:

That on or about November 30, 1953, at Norristown, Pennsylvania, in the Eastern District of Pennsylvania, Paul Deemer Johnston, being a male person subject to the rules and regulations of the Selective Service Act of 1948, as amended by the Universal Military Training and Service Act and the rules and regulations made pursuant thereto, did knowingly neglect to perform a duty imposed upon [fol. 9] him by the provision of said Act in that he failed and refused to obey an order of Local Board 87, New Castle, Pennsylvania, directing him to report for employment at Norristown State Hospital, Norristown, Pennsylvania, and to remain employed there for twenty-four consecutive months in violation of Title 50, U. S. C. Appx., Sections 456 and 462, as amended.

True Bill.

E. Price Burnham, Foreman.

W. Wilson White, United States Attorney, by G. Clinton Fogwell, Jr., Assistant United States Attorney.

[fol. 10] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

MOTION TO DISMISS, SOKOL CASE—Filed November 5, 1954

The defendant, John Sokol, by his attorney, Michael Hahalyak, moves that the indictment be dismissed on the following grounds:

1. The Court is without jurisdiction over the person of defendant.
2. The offense, if any, is cognizable only in The District Court for the Western District of Pennsylvania.
3. That the burdens imposed upon the defendant are such that would constitute a violation of procedural due process under the United States Constitution, in the event that defendant would be subject to jurisdiction.

(S.) Michael Hahalyak, 403 Commonwealth Building, Pittsburgh 22, Pa.

[fol. 11] IN THI UNITED STATES DISTRICT COURT FOR THE EASTE..N DISTRICT OF PENNSYLVANIA

[Title omitted]

MOTION TO DISMISS, JOHNSTON CASE—Filed November 5, 1954

The defendant, Paul Deemer Johnston, by his attorney, Michael Hahalyak, moves that the indictment be dismissed on the following grounds:

1. The Court is without jurisdiction over the person of defendant.
2. The offense, if any, is cognizable only in the District Court for the Middle [sic] District of Pennsylvania.
3. That the burdens imposed upon the defendant are such that would constitute a violation of procedural due process under the United States Constitution in the event that defendant would be subject to jurisdiction.

Michael Hahalyak, 403 Commonwealth Building, Pittsburgh 22, Pa.

[fol. 12] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

STIPULATION PERTAINING TO VENUE, SOKOL CASE—Filed March 15, 1955

The parties in the above proceeding stipulate to the following facts pertaining to venue in order to permit the Court to dispose of defendant's motion to dismiss the indictment charging defendant with violation of the Universal Military Training and Service, in failing to obey the order requiring the defendant to report for work, on the ground that this Court lacks jurisdiction over the defendant:

1. Defendant registered with the local draft board situate in the western judicial district of Pennsylvania.

2. Defendant at all times resided in the western judicial district of Pennsylvania.

[fol. 13] 3. The local board classified defendant 1-O (conscientious objectors) as his final classification.

4. Pursuant to said classification the local draft board in accordance with the Selective Service regulations notified defendant by mail (Form SSS 153) in the western judicial district of Pennsylvania to report to it for assignment of civilian work in lieu of induction.

5. On March 22, 1954, defendant personally reported to his local board as requested in SSS Form 153. At said time defendant personally refused to accept the local board's order to report to the Philadelphia State Hospital in Philadelphia on the ground that he was a minister of the gospel and could not partake in any branch of the service.

6. Defendant never physically entered the eastern judicial district of Pennsylvania to report for or to perform the work assigned to him.

Michael Hahalyak, Attorney for Defendant; W. Wilson White, United States Attorney.

[fol. 14] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

STIPULATION PERTAINING TO VENUE, JOHNSTON CASE—Filed March 15, 1955

The parties in the above proceeding stipulate to the following facts pertaining to venue in order to permit the Court to dispose of defendant's motion to dismiss the indictment charging defendant with violation of the Universal Military Training and Service, in failing to obey the order requiring the defendant to report for work, on the ground that this Court lacks jurisdiction over the defendant:

1. Defendant registered with the local draft board, situate in the western judicial district of Pennsylvania.

2. Defendant at all times resided in the western judicial district of Pennsylvania.

[fol. 15] 3. The local board classified defendant 1-O (conscientious objectors) as his final classification.

4. Pursuant to said classification the local draft board in accordance with the Selective Service regulations notified defendant by mail (Form SSS 153) in the western judicial district of Pennsylvania to report to it for assignment of civilian work in lieu of induction.

5. Defendant personally reported to his local draft board in the western judicial district of Pennsylvania in accordance with the instructions noted in SSS Form 153. He was instructed to report to the Norristown State Hospital, Norristown, Pennsylvania, on November 30, 1953. Defendant personally refused to accept said work. He also filed with the local board a statement in which he informed the board that he could not conscientiously accept the work assigned to him for the reasons more fully stated in his file.

6. Defendant never physically entered the eastern judicial district of Pennsylvania to report for or to perform the work assigned to him.

Michael Hahalyak, Attorney for Defendant; W. Wilson White, United States Attorney.

[fol. 16] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 17,804

UNITED STATES OF AMERICA

v.

PAUL DEEMER JOHNSTON

Criminal No. 17,879

UNITED STATES OF AMERICA

v.

JOHN SOKOL

IX

OPINION—Filed March 17, 1955

GANEY, J.:

Each of the defendants' motion to dismiss the indictment against him raises the troublesome question of venue-jurisdiction. Defendants were indicted for knowingly neg-[fol. 17] lecting to perform a duty imposed upon them pursuant to the provisions of the Universal Military Training and Service Act of 1948, 62 Stat. 604, as amended, 50 U. S. C. A. Appendix, § 451 et seq.

The defendant, Paul Deemer Johnston, resided in the Western District of Pennsylvania. He registered under the Act with his local draft board in that district, and throughout his selective proceedings he dealt only with selective service personnel there. He was finally given a I-O classification as a conscientious objector, which entitled him to perform two years of civilian work contributing to the national health in lieu of his being inducted into the armed forces. Subsequently the local board, in accordance with Selective Service regulations, notified him by mail in the western judicial district of Pennsylvania to report to it for the assignment of civilian work. He was instructed to report to the Norristown State Hospital located in the Eastern District of Pennsylvania, the judicial district of this court, on November 30, 1953. At the time of the as-

signment, he personally notified the board of his refusal to accept such employment. He has not entered this district to report for the assigned work.

The story of the other defendant, John Sokol, is parallel to that of defendant Johnston.

On the assumption that when the omission to perform a duty constitutes a crime, the venue is in the judicial district in which the duty should have been performed, the Government indicted the defendants in this district.[1] [fol. 18] Our problem, as in United States v. Anderson, 328 U. S. 699, 705 (1946), is to ascertain what duty it was, the failure to perform, that constituted the crime, and what acts of the defendants constituted the violation in order to determine where the crime was committed.

Clearly the duty in each case was to report to the State hospital, the place of performance, in this judicial district. However we think the violation was the defendants' refusal to report to the place of performance. The refusal in both cases took place in the Western District of Pennsylvania, and not in this district where defendants were never physically present.[2] Penor v. United States, 9th Cir. 1948, 167 F. 2d 553, 555; United States v. Chiarito, D. C. Ore. 1946, 69 F. Supp. 317, 322-325.

Accordingly, the defendant's motion in each case to dismiss the indictment will be allowed for lack of jurisdiction.

---

[1] Cf: Footnote 14 on page 705 of United States v. Anderson, 328 U. S. 699 (1946).

[2] See footnote 11 on page 704 of United States v. Anderson, 328 U. S. 699, in which the Court pointed out that "the Department of Justice in 1942 had instructed United States Attorneys that, in cases of failure to report for induction, 'venue is in the district where the subject was ordered to report', *apparently without regard to whether he had been present physically there.*" (Italics supplied.)

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JAN 23 1956
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1955

No. 643

PAUL DEEMER JOHNSTON, Petitioner

v.

UNITED STATES OF AMERICA

No.

JOHN SOKOL, Petitioner

v.

UNITED STATES OF AMERICA

Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York
Counsel for Petitioners

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Section 1660.31 (a)	7, 36
"Selective Service," National Headquarters, Selective Service System, Washington, D. C., Jan. 1956, Vol. VI, No. 1	4
18 U. S. C. A. §§ 420 (f)-(h) (Federal Denture Act)	15
18 U. S. C. § 3231	2
28 U. S. C. § 1254 (1)	2
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United States Constitution, Amendment VI	2, 11, 13, 17

Supreme Court of the United States

OCTOBER TERM, 1955

No.

PAUL DEEMER JOHNSTON, Petitioner

v.

UNITED STATES OF AMERICA

No.

JOHN SOKOL, Petitioner

v.

UNITED STATES OF AMERICA

Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Each petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit reversing the judgment of the United States District Court for the Eastern District of Pennsylvania, dismissing the indictment returned against

each petitioner, charging a violation of the Universal Military Training and Service Act, because the offense in each case was not committed in the district and, therefore, the court did not have jurisdiction.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It is printed as Appendix A to this petition. The opinion of the District Court is reported (131 F. Supp. 955 (E. D. Pa. 1955)). It is printed as Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 1955. (See Appendix C to this petition, pages 28-29, *infra.*) A petition for rehearing was filed and denied on January 4, 1956. (See Appendix D to this petition, page 30, *infra.*) The time for filing this petition for writ of certiorari expires February 3, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1). (See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.) The District Court had jurisdiction under 18 U. S. C. § 3231.

QUESTION PRESENTED

Where each petitioner resided in the Western District of Pennsylvania, the Selective Service local board of each was located in the Western District of Pennsylvania, the orders to perform work were issued in the Western District of Pennsylvania and each petitioner did not go beyond his local board in the Western District of Pennsylvania and at all times refused to leave the Western District of Pennsylvania and did not proceed to the Eastern District of Pennsylvania, were the offenses committed in the Western District of Pennsylvania and not in the Eastern District and, therefore, does it violate rights guaranteed by the Sixth Amendment to the Constitution to indict and

prosecute each petitioner in the Eastern District of Pennsylvania?

STATUTES AND REGULATIONS INVOLVED

Section 12 (a) of the Universal Military Training and Service Act (50 U. S. C. App. § 462 (a)) is involved. Also Section 6 (j) of the Act must be considered (50 U. S. C. App. § 456 (j)).

Sections 1660.1, 1660.20, 1660.30 and 1660.31 of the Regulations (32 C. F. R. §§ 1660.1, 1660.20, 1660.30 and 1660.31) are involved. These are extensive provisions which are printed as Appendix E, *infra*, page 31.

STATEMENT OF THE CASES

Petitioners were indicted for failure to comply with orders of their local boards directing them to report to state hospitals in the Eastern District of Pennsylvania to do civilian work contributing to the maintenance of the national health, safety and interest. Petitioners did not report to the state hospitals in the Eastern District of Pennsylvania. They did not leave the Western District of Pennsylvania. In that federal judicial district they refused to leave the district and proceed to the state hospitals located in the Eastern District of Pennsylvania. Each petitioner did not go beyond his local board located in the Western District of Pennsylvania, in defiance of the order of that board, issued in the Western District of Pennsylvania.

At all times petitioners refused to leave the Western District of Pennsylvania and never, at any time, reported to the state hospitals in the Eastern District of Pennsylvania to perform the work in compliance with the orders of the local boards. The facts are adequately and sufficiently stated in the opinion of the Court of Appeals. Reference is here made to that statement, appearing on page 19, *infra*, Appendix A. See also the statement of the facts

appearing in the opinion of the trial court at page 26, *infra*, Appendix B.

REASONS FOR GRANTING THE WRIT

The court below decided an important question of law that has not been, but that ought to be, decided by this Court. The holding directly conflicts with *United States* v. *Patteson*, 10th Cir., No. 5123, January 19, 1956. The opinion of the Tenth Circuit in that case is attached hereto.—See Appendix F, *infra*, pages 39 to 43. Importance of the substantial question and the conflict give this Court jurisdiction under Rule 19 (b) of the Rules of this Court. The importance and substantiality of the question shall now be shown.

The prosecutions involved nonfeasance or a refusal to act, which is a violation of the law. The question is of great importance to the Government, trial judges, lawyers representing such persons accused of such offenses, the persons charged and all other persons who may be concerned with the refusal to comply with an administrative order.

At the present time the Department of Justice has in abeyance, awaiting a final determination as to what court has jurisdiction, scores, if not hundreds, of prosecutions of conscientious objectors who have refused to report for civilian work. District attorneys in many parts of the United States are awaiting a final determination of the question so that they will know which court has jurisdiction, the district court where the board is located and where the order was defied or the district court located where the place of work should have been performed, but where it was not performed as ordered by the local board, is located.

A late bulletin of the National Headquarters of the Selective Service System, entitled "Selective Service" (Washington, D. C., January 1956, Vol. VI, No. 1), shows that there are 1,457 persons classified as conscientious objectors who have been physically examined and 3,700

who have not been examined. Of this number of several thousand a large number of cases involve persons who have refused to report for civilian work. Several hundred cases ultimately will be in the district courts. In each of these cases there is involved the question as to what court has jurisdiction.

The district courts have disagreed as to jurisdiction. (*United States* v. *Sutter*, S. D. Cal., 127 F. Supp. (1954); *United States* v. *Johnston and Sokol*, E. D. Pa., 131 F. Supp. 955 (1955); *United States* v. *Chiarito*, D. Or., 69 F. Supp. 317 (1946); *United States* v. *Patteson*, D. Kans., No. 9391, May 16, 1955), affirmed on appeal, 10th Cir., No. 5193, January 19, 1956, Appendix F, pp. 39-43, *infra*.

The decision of the court below ignores completely *Falbo* v. *United States*, 320 U. S. 549 (1944); *Billings* v. *Truesdell*, 321 U. S. 542 (1944); *Estep* v. *United States*, 327 U. S. 114 (1946). The court was blind to the offense of refusal to comply with the draft board orders, which took place initially in the Western District of Pennsylvania. This serious oversight was produced by the court's looking at the last step in the stairway of connected steps instead of the next step. The court below took one long step from the top step down to the bottom instead of going down the stairs, step by step, through the connected series of steps fixed by the Selective Service Regulations.

Section 12 (a) of the act (50 U. S. C. App. § 462 (a)) provides that any person—

> "... charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty ... shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment."

Section 1660.1 of the Selective Service Regulations (32 C. F. R. § 1660.1) defines the appropriate civilian work that may be done by a conscientious objector. 32 C. F. R. § 1660.20 (a) provides for the conscientious objector to submit three types of civilian work to the local board, from which it is to determine one that is appropriate. 32 C. F. R. § 1660.20 (b) provides for the local board to submit three types of civilian work to the registrant in the event the registrant fails to submit three types of work that he offers to perform or if the local board is not satisfied with the three types of work he submits to it. C. F. R. § 1660.20 (c) provides for a hearing before the board attended by a representative of the state director and the registrant, for the purpose of reaching an agreement in the event the registrant and the board have not theretofore agreed upon the type of work to be done. 32 C. F. R. § 1660.20 (d) provides for the local board, upon approval of the Director of Selective Service, to order the registrant to perform civilian work.

32 C. F. R. § 1660.21 (a) provides that no registrant shall be ordered to perform civilian work "in the community in which he resides" unless the local board finds it is "desirable in the national interest."

32 C. F. R. § 1660.30 provides as follows:

> *"Failure or Neglect to Obey Order to Perform Civilian Work.*—Any registrant who knowingly fails or neglects to obey an order from his local board to perform civilian work contributing to the maintenance of the national health, safety, or interest in lieu of induction shall be deemed to have knowingly failed or neglected to perform a duty required of him under title I of the Universal Military Training and Service Act, as amended. When any registrant fails or neglects to obey any such order, his Cover Sheet (SSS Form No. 101) and contents shall be forwarded to the Director of Selective Service for a deter-

mination as to whether or not the registrant shall be reported to the Department of Justice for prosecution."

The significance of the difference between failing to report for work at the place assigned and reporting there and thereafter refusing to perform the work is emphasized in 32 C. F. R. § 1660.31 (a). If a registrant is ordered to do work at a hospital but refuses to report for work, then his local board file remains under the jurisdiction of the local board and the state director of the state where the local board is located. Should the conscientious objector report at the hospital to perform the work, then the file is transferred to the state director of the state where the place of performance of the civilian work is located.

Had petitioners resided, and the boards been located, in a state other than Pennsylvania, then the files would never have been under the jurisdiction of the Pennsylvania State Director. The reason the State Director of Pennsylvania had jurisdiction of the files was that petitioners resided in the State of Pennsylvania and the boards were located there. The State Director of Pennsylvania did not get jurisdiction of the files by reason of petitioners reporting at the state hospital to do the work.

In *Dodez* v. *United States*, 329 U. S. 338 (1946), the registrant was ordered to go to a civilian public service camp at Medaryville, Indiana. His local board was located in Ohio. He wrote the local board stating he would not report as ordered. He failed to report. He was prosecuted in the Northern District of Ohio, and not in Indiana.

In *Gibson* v. *United States*, 329 U. S. 338 (1946), the registrant was ordered to report to a civilian public service camp in South Dakota. He registered with a local board at Eldorado, Arkansas. After reporting at the camp in South Dakota he departed without leave. He was indicted and prosecuted in the District of South Dakota.

In *Jeffries* v. *United States*, 10th Cir., 169 F. 2d 86 (1947), it was held that, when a registrant reported at

his local board and stated his refusal to proceed to a civilian public service camp to perform work of national importance, the registrant committed the offense of failing to report to his board to do work of national importance. In that case the defendant registered with his local board in Scott City, Kansas. He was thereafter ordered by the local board to report for work of national importance and proceed to the civilian public service camp at Lapine, Oregon. The defendant was indicted, prosecuted and convicted in the District of Kansas. His conviction was affirmed by the Court of Appeals, which constituted an implied finding that the District of Kansas had jurisdiction of the offense.

The statute, the regulations and the above-cited cases show that there are separate offenses. There is the offense of failing to report for civilian work. This offense is committed even though the registrant appears at the local board and states his determination not to perform the civilian work. There is the additional and separate offense of refusing to perform civilian work after having reported for such work at the place where it was ordered to be performed. Where the registrant fails to proceed to the place of performance of such work he has committed an offense of failing to report for such work. The offense is obviously committed in the district where his local board is located, and where he refuses to go farther.

The other offense is committed at the place where the civilian work is ordered to be performed. This is committed where the registrant reports for work but thereafter refuses to perform the work. This offense is committed in the district where the place of work is located.

The two offenses are distinct and separate. The federal district court where the board is located has no jurisdiction over the offense of refusing to perform civilian work where the registrant has reported at the place of work and refused to do the work, as in the case of the defendant in *Gibson v. United States*, 329 U. S. 338 (1946). The district court where the place of work is located has no jurisdiction over

the offense where a registrant reported to the local board or did not proceed to the place of work, as in the cases of *Dodez* v. *United States*, 329 U. S. 338 (1946), and *Jeffries* v. *United States*, 169 F. 2d 86 (10th Cir. 1947).

If each petitioner in these cases had been ordered to report for induction into the armed forces and refused to report for induction there would be no doubt that jurisdiction would be fixed in the United States District Court for the Western District of Pennsylvania. Had each petitioner been ordered to report for induction in Philadelphia and reported at such induction center and then refused to submit to induction, there would be no doubt that the United States District Court for the Eastern District of Pennsylvania would have jurisdiction. Had each petitioner been ordered under the 1940 Act (50 U. S. C. App. §§ 301-318) to report to his local board and to do work of national importance in a civilian public service camp in the Eastern District of Pennsylvania, and thereafter failed to proceed to such civilian public service camp, there would be no doubt that jurisdiction would be in the United States District Court for the Western District of Pennsylvania. (*Dodez* v. *United States*, 329 U. S. 338 (1946)) But assume that they had proceeded to the civilian public service camp in the Eastern District of Pennsylvania, and there refused to perform the work, and were indicted therefor, then there would be no doubt that the Eastern District of Pennsylvania would have jurisdiction.—*Gibson* v. *United States*, 329 U. S. 338 (1946).

In the opinion written by Judge Goodrich in these cases, *infra*, p. 19, the court below likened the refusal to comply with the draft board order to the familiar illustration made in venue cases of shooting across a state line and killing a person in the adjoining state. The court below also simulated the refusal to comply with the draft board order to cases of publication of libelous words in more than one jurisdiction, false representation by means of mail delivered in another state, shipment of impure foods from one state

to another and a solicitation in one state by a person made to an employee in another state to violate his official duties.

These illustrations relied on by the court below in these cases and claimed to be analogous are not at all analogous. They are obviously distinguishable. The acts were *affirmative* acts. They involved offenses of misfeasance and malfeasance passing from one jurisdiction to another. They did not involve the distinctly different situation here, which is a refusal to act, or nonaction. The case here involves no overt act committed in one district that extends into another.

The analogy drawn by Judge Goodrich turns to the nonaction of each petitioner's refusing to comply with the draft board order. It is likened to the refusal and failure of a person to file reports and returns in different administrative agencies. The court below also likens the nonaction of the registrants to a refusal to comply with an order to appear before a legislative committee. All the instances relied on by the court below in these cases are not in point. They involved orders issued by the tribunals located in the district where the prosecutions were brought. But these cases do not involve orders issued by tribunals in the district where the prosecution was brought. The cases relied on in the opinion of the court below in these cases do not support the conclusion reached. They are also patently distinguishable. The tribunals issuing the orders in these cases were located in a district other than that where the prosecution was brought. It is the source of the authority or the order that determines the place of violation of the law or the place of the offense. Since all the cases relied on in these cases involved orders issued by a tribunal in the district where the prosecution was brought and not orders issued by a tribunal outside the district, as in these cases, such cases are, upon their face, not in point and do not support, in any sense of the word, the conclusion reached by the court below in these cases.

The only two cases relied on by the court below in its

opinion that are seemingly in point are *State* v. *Peabody*, 25 R. I. 544, 56 A. 1028 (1904), and *State* v. *Yocum*, 182 Ind. 478, 106 N. E. 705 (1914). (See footnote 14 of the slip opinion.) But these two cases are not in point. They involve the failure to support children contrary to law. It may seem that these two cases are analogous to the refusal to comply with the local board order. But they are distinguishable. In those cases there was involved the liability to support children, which followed the children wherever they went in the state. It was a transitory obligation. The obligation here is not transitory. The orders were issued in the Western District of Pennsylvania. The refusal to comply with the order issued in the Western District of Pennsylvania is the basis for the offense in each case. The obligation began in the Western District of Pennsylvania and the order was breached in the Western District of Pennsylvania and not in the Eastern District of Pennsylvania. But assuming that the *Peabody* and *Yocum* cases are in point, then these two cases relied upon by the court below in its opinion are challenged as being erroneous. Neither the *Peabody* nor the *Yocum* case dealt with the Sixth Amendment. Indeed the courts did not discuss the constitutional right of the defendants to be tried in the district where the offense was committed. The courts merely dealt with a common law question of venue. The courts did not have to consider the basic question of the lack of jurisdiction resulting from the mandate of the Sixth Amendment, relied upon by the petitioners here.

The court below, therefore, fatally erred when it relied on the *Peabody* and *Yocum* cases as authority for the conclusion it reached in these cases. Judge Goodrich said (*infra*, p. 23): "We think what is being prosecuted here is the failure of these defendants to do what the law required them to do." This statement is proper, but the court below circumnavigates the next question and leaves a vacuum by concluding that the refusal took place at the hospital. But the refusal in these cases did not take

place at the hospital. The refusal there took place in the Western District of Pennsylvania, where the orders were given. Here the petitioners refused to comply with the orders in—and only in—the Western District of Pennsylvania. They did not violate any order at the hospital in the Eastern District of Pennsylvania. There was no refusal to obey any order there.

In footnote 13 of its opinion, *infra*, p. 22, the court below cites the English case of *Regina* v. *Milner*, 2 Car. & K. 309, 175 Eng. Rep. 128 (1846), which is also cited in *United States* v. *Anderson*, 328 U. S. 699, 705 (footnote 14). The offense there was failure to appear before the district court in Birmingham that had issued the order. This case is analogous to failure to appear before a local board that had issued the order. It is identical with the factual situation here. The failure to appear before a local board to proceed to perform the civilian work, as was held in *Jeffries* v. *United States*, 10th Cir., 169 F. 2d 86 (1947), is the offense committed, and the offense was committed in the case at bar in the Western District of Pennsylvania and not in the Eastern District of Pennsylvania.

The case of *New York Central & H. R. R. Co.* v. *United States*, 2d Cir., 166 F. 267 (1908), cited in footnote 18, is likewise not in point. The failure to file a document at a place fixed by statute is the same as failure to report before the local board for the performance of civilian work and not the failure to report at the place where the work is located.

United States v. *Van Den Berg*, 7th Cir., 139 F. 2d 654 (1944), relied upon in footnote 20, *infra*, p. 23, is not in point. The holding in that case supports the position taken by petitioners here, that jurisdiction is to be determined by the place where the order is given. In that case the local board was located in the Eastern District of Wisconsin, and the defendant was registered in the Eastern District of Wisconsin. There the court held that the Eastern District had jurisdiction and such holding is directly in

point. The other cases cited in footnote 20 are the same factually and also do not support the Court's conclusion.

But in the same footnote and not cited as authority for the holding by the court below is the case of *United States* v. *Chiarito,* 69 F. Supp. 317 (D. Or. 1946). That case is directly in point here and is more in consonance with justice, fair play and the spirit of the Sixth Amendment. The opinion was written by Judge James Alger Fee, who is now a member of the United States Court of Appeals for the Ninth Circuit.

One cannot help but be persuaded that the reasoning in the *Chiarito* case is basically more sound than the opinion of the court below in these cases. The reasoning of Judge Fee is cogent. This Court should consider what Judge Fee has to say on this question (69 F. Supp. at pages 321-325). This Court should adopt *United States* v. *Chiarito,* 69 F. Supp. 317, and set aside the decision in these cases.

There is no difference whatever between the offense of failing to report for civilian work under the Universal Military Training and Service Act and the offense of failing to report for civilian work of national importance under the 1940 Act (50 U. S. C. App. §§ 301-318). The offense is committed under each act by the failure to report at the place of work and enter upon the performance of such civilian work. The offense of leaving a civilian public service camp under the 1940 Act is the same as the offense of leaving a place of civilian employment under the present Act (50 U. S. C. App. §§ 451, *et seq.*). Under both acts the jurisdiction of the district court is to be determined by the place of the offense. Under both acts the place of the offense of failing to report for work is in the district where the local board is located. Under both acts the jurisdiction of the offense of leaving civilian work is in the place where such work is ordered to be performed.

Since the district court where the board is located has jurisdiction of the offense of failing to report for induc-

tion, when the registrant fails to proceed to the induction center, then, by force of the same reason, the same court would have jurisdiction over the failure of a registrant classified as a conscientious objector to proceed to the place of work. The offense is identical in each case. It is committed in the same district, namely, the place where the order to report was given.

To emphasize the error of the opinion by the court below, consider the following: Under the law a conscientious objector can be ordered to do work outside the continental United States and its possessions. The conscientious objector may be sent anywhere in the world a soldier can be sent. He may be ordered to perform alternate civilian work any place in the world. Assume now that the conscientious objector is ordered to do civilian work in lieu of induction in Korea. Then, under the reasoning of the court below the only federal court in the United States or its possessions that would have jurisdiction to prosecute, in the event he refused to report for and perform the civilian work, would be the district where he was found —which in these cases is the Western District of Pennsylvania. Certainly the law is not so unreasonable, impossible and ineffective as a logical extension of the doctrine in the opinion below makes it. This analogy shows the fundamental error that underlies the decision of the court below.

It is unreasonable and unfair and imposes a harsh burden upon the defendant to give jurisdiction to the district court where the offense was not committed. It is not the location of the place of work that counts, any more than the location of the place where a registrant is ordered to submit to induction would be determinative, if he did not report at such place for induction. It it the place where the offense was committed that gives jurisdiction to the court. In all cases where the registrant reports to the local board, and then refuses to go any farther, or declines even to report, either to a place where he is ordered to perform

civilian work or to a place where he is ordered to submit to induction, the offense is still committed at the place where the local board that issued the order is located.

The Sixth Amendment to the Constitution requires that defendants in criminal cases be tried in the district wherein the crimes were committed. Petitioners submit that the *locus delicti* of the alleged crimes is in the Western District of Pennsylvania. The above analysis of the nature of the crime and its constituent elements fully discloses this.

The position that the petitioners take here is supported by *United States* v. *Johnson*, 323 U. S. 273 (1944). In that case the defendant was indicted for violating the Federal Denture Act (18 U. S. C. A. §§ 420 (f)—420 (h)). The information was filed in the District of Delaware and charged the defendant with depositing in the mails at Chicago for delivery in Delaware certain dentures, in violation of the Delaware laws, contrary to the Federal Denture Act. The information was quashed on the ground that the defendant could be prosecuted only where the dentures were deposited in the mails. The court pointed out that, in the absence of specific venue provisions giving the Government a choice of trial, the place of trial should be fixed to be consistent with "the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."—323 U. S. at page 276.

The Court also pointed out that, where a defendant is prosecuted in a place other than that of his residence or the place of commission of the offense, he would be subjected to "serious hardship of defending prosecutions in places remote from home." The Court said that such practice of allowing the Government to select places of prosecution remote from the place where witnesses are located gives rise to the "temptation to abuses, already referred to, in the administration of criminal justice." (323 U. S. at page 276.) The attention of the Court is directed also to the

concurring opinion of Mr. Justice Murphy in that case (323 U. S. at page 279).

The harshness and the injustice that a defendant in a criminal case will be subjected to are unlimited if the position taken by the court below in these cases is correct. A local board on the eastern coast of the United States could order a registrant living in the eastern states to report for civilian work on the west coast or in Hawaii or Alaska. He could then be prosecuted in those remote places where he had never gone. The Government would be in position to transport its witnesses all the way across the continent or to any other place, but the defendant—in most if not in all cases—would be absolutely deprived of witnesses to corroborate his defenses or prove his good character.

If the Government is given such power in cases such as these, then there will be an end to many possible defenses that a conscientious objector might have under the law. It is significant that, in cases where a registrant is ordered to report for induction at a place too distant for his convenience, he may have the order to report for induction changed and transferred to a place nearer and more convenient to him. (32 C. F. R. § 1632.9) This regulation makes it impossible for a registrant who is ordered to report for induction into the armed forces to be mistreated and denied the right of trial in a district court convenient to him. Also, the registrant classified as a conscientious objector is entitled to be tried in the district court where the board is located, and may not be tried in some faraway place where he has never traveled, because, under the Regulations, he has exhausted his administrative remedies upon the taking of the physical examination and his appeal. He is not required to respond and travel to the place where the civilian work is to be performed in order to exhaust his remedies.—*Dodez* v. *United States*, 329 U. S. 338 (1946).

The court below would go a step farther and force the

jurisdiction of the court in *Gibson* v. *United States*, 329 U. S. 338 (1946), upon a registrant, who refuses to go so far as Gibson went, but who desires to rest on his rights and defend, as did the registrant in *Dodez* v. *United States*, 329 U. S. 338 (1946). The Government should be given no such weapon of hardship and inconvenience to be used at its discretion in the prosecution of persons classified as conscientious objectors and ordered to do civilian work at places far distant from their residences and the location of the local board as the court below has handed to it contrary to the intent of the authors of the Sixth Amendment.

CONCLUSION

For the reasons above stated it is respectfully submitted that this joint petition for writ of certiorari should be granted.

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Counsel for Petitioners

January, 1956.

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,620

UNITED STATES OF AMERICA,

Appellant

v.

PAUL DEEMER JOHNSTON

No. 11,621

UNITED STATES OF AMERICA,

Appellant

v.

JOHN SOKOL

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued November 2, 1955

Before GOODRICH, STALEY and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed December 1, 1955)

By GOODRICH, *Circuit Judge.*

These two cases raise the question of the proper venue in a prosecution for disobedience of the provisions of the Universal Military Training and Service Act.[1] The facts are simple and undisputed. The two defendants registered in accordance with the draft law and were classified I-O. Each was directed by his local board to appear before the board to be assigned to "Civilian work contributing to the maintenance of the national health, safety, or interest . . ."[2] Each appeared before his local board in accordance with the instructions received in SSS Form No. 153. Sokol was assigned to hospital work at Philadelphia State Hospital, Philadelphia, Pennsylvania, and Johnston to the Norristown State Hospital, Norristown, Pennsylvania. Both hospitals are located in the eastern district of Pennsylvania. Each told his local board that he would not obey the order of assignment and each never entered the eastern district to do the work assigned. Both at all times resided in the western district of Pennsylvania and their local boards were located in this district. Both registrants were indicted in the eastern district of Pennsylvania. The district court dismissed each indictment for lack of "venue-jurisdiction."[3]

Our first problem is to find out just what offense these men are charged with. The indictments each refer to title 50 U. S. C. App. sections 456 and 452. The Sokol indictment refers more particularly to section 456(j). The references to these two sections of the statue appear both at the head and in the body of the indictments. Section 456(j) has as its subject matter the treatment of those who by reason of religious training and belief are conscientiously opposed to participation in war. Provision is made for the manner

[1] 62 STAT. 604 (1948), *as amended*, 50 U. S. C. App. § 451-473 (1952).
[2] 65 STAT. 86 (1951), 50 U. S. C. App. § 456(j) (1952).
[3] United States v. Johnston, 131 F. Supp. 955 (E. D. Pa. 1955).

in which this claim shall be presented. There appears in the section the authorization to the board to assign a registrant found to be conscientiously opposed even to noncombatant service to work of national importance. It states that one who "knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title."[4]

In section 462 (section 12 of the act) the conduct which is, among others, subject to sanction, is in any manner to "knowingly fail or neglect or refuse to perform any duty required of him under . . . this title . . ."[5]

It will be noted that paragraph (j) above quoted carries the words "fails or neglects." Section 462 adds the word "refuses." Did these registrants "refuse" to obey orders in the western district in such way as to make them responsible for violation of the statute under section 462? It is agreed that they there stated to their respective boards that they were not going to obey their assignment for service. We do not need to answer the question just stated because the defendants are not being prosecuted in the western district for their defiance of the board. They are indicted, instead, in the eastern district. It was in the eastern district where they failed to appear to do the work assigned to them. And it is this failure which constitutes the offense, if any, in the eastern district. Do the indictments charge this offense?

As to Sokol the answer is clear. He was indicted for neglecting "to perform a duty . . . in that he failed to report to the . . ." assigned hospital. Johnston, on the other hand, was charged with neglecting "to perform a duty . . . in that he failed and refused to obey an order . . . directing him to report . . ." at the place of assignment. As we construe this indictment, it charges Johnston with,

[4] 65 Stat. 86 (1951), 50 U. S. C. App. § 456(j) (1952).
[5] 62 Stat. 622 (1948), 50 U. S. C. App. § 462(a) (1952).

among other things, failing to report to the specified hospital as ordered. That part of the indictment which charges him with possible offenses other than failing to report can be disregarded as as surplusage.[6]

It is apparent that the failure to report to the place of assignment is an indictable offense under the act. Section 462 makes it an offense to fail to perform a duty imposed by authority of the statute. Section 456(j) poses no obstacles. Indeed it raises the board's order to report to the level of a duty under section 462, at least to the extent that "failure" or "neglect" to obey the order is considered to be a violation of such a duty. On the other hand, we do not believe that the Sokol indictment is inadequate in that the board's order is not mentioned. The duty it created is. But where is the offense of failure to report consummated?

Now we have reached the interesting substantive question of criminal law. It is well established that one does not have to be physically present in a state to be guilty of a criminal offense there. The standard illustration, familiar to every law student, is that of shooting across a state boundary line and hitting a victim in the second state. The offense is complete where the fatal force hits the victim and the defendant may be prosecuted for homicide there if jurisdiction can be obtained over his person.[7] The same theory has been applied in both torts and crimes with regard to dissemination of defamatory words,[8] the loss sustained to one relies upon false representations given to him by another from another state,[9] the injury resulting

[6] *Cf.* Ford v. United States, 273 U. S. 593, 602 (1927).

[7] State v. Hall, 114 N. C. 909, 19 S. E. 602 (1894); United States v. Davis, 25 Fed. Cas. 786, No. 14,932 (1st Cir., 1837); see also RESTATEMENT, CONFLICT OF LAWS, Note § 377, ill. 1 at 456 (1934) (same principle applicable in torts).

[8] *Torts:* RESTATEMENT, CONFLICT OF LAWS, Note § 377, ill. 7 at 457 (1934). *Crimes:* Sachs v. Government of the Canal Zone, 176 F. 2d 292, 297 (5th Cir. 1949); State v. Piver, 74 Wash. 96, 132 P. 858 (1913).

[9] *Torts:* RESTATEMENT, CONFLICT OF LAW, Note § 377, ill. 5, 6 at 457 (1934). *Crimes:* Updike v. People, 92 Col. 125, 18 P. 2d 472 (1933); State v. Devot, 66 Utah 319, 242 P. 395 (1925); *but see* Commonwealth v. Schmunk, 22 Pa. Sup. 348 (1903), *affirmed*, 207 Pa. 544, 56 A. 1088 (1904). The conflict in the crimes cases stems from the fact that the

when canned food imported and distributed from one state causes harm in another,[10] and the attempt by letter mailed in one state to induce a public employee in another to violate his official duties.[11]

These defendants, however, did no act nor did they follow any course of conduct in the eastern district of Pennsylvania. What is being complained of is their failure to do, not what they did. This case raises the point left unanswered in *United States v. Anderson*, 328 U. S. 699, 706 (1946). But we think the answer is pretty clear on the basis of established legal rules applicable to other cases of omissions which have been made crimes. It is true, and no one disputes, that the Constitution (Sixth Amendment) requires that a person shall be tried in a district where the crime shall have been committed.[12] But it is also clear that where there is a legal duty to act and the failure to do that act is a criminal offense, the courts consider the criminal offense to take place where the defendant failed to perform that which the law required of him. This is illustrated by a variety of decisions in different fact situations. Here are some of the instances: the failure of an individual doing business in one county to surrender himself at a district court in another in response to a fiat in bankruptcy,[13] the neglect of a father residing in one county to support his children residing in another,[14] the failure of a witness to appear before a legislative committee in obedience to a summons,[15] the failure to file necessary reports

substantive offense requires proof of the receipt, and not merely the loss, of property.

[10] *Torts:* Hunter v. Derby Foods, Inc., 110 F. 2d 970 (2nd Cir. 1940).

[11] *Crimes:* In re Palliser, 136 U. S. 257 (1890). Referring to U. S. CONST. art III, § 2, cl. 3 and U. S. CONST. amend. VI, the Court said that "the right thereby secured is not a right to be tried in the district where the accused resides, or even in the district in which he is personally at the time of committing the crime, but in the district 'wherein the crime shall have been committed.'" (*Id.* at 265).

[12] *Ibid.*

[13] Regina v. Milner, 2 Car. & K. 309, 175 Eng. Rep. 128 (1846).

[14] State v. Peabody, 25 R. I. 544, 56 A. 1028 (1904); State v. Yocum, 182 Ind. 478, 106 N. E. 105 (1914).

[15] State v. Brewster, 87 N. J. L. 75, 93 A. 189 (1915).

with the appropriate governmental authorities in the District of Columbia concerning (1) the custody of enemy property and the indebtedness of alien enemies,[16] (2) an alien woman[17] and (3) rates and charges of a railroad,[18] and the failure to file tax returns with the Collector in the appropriate internal revenue district.[19]

We see no reason why this well established line of authority should not be applied in these selective service cases. We think what is being prosecuted here is the failure of these defendants to do what the law required them to do. Suppose these young men, after defying the local board in their respective communities, had within the period allotted for travel changed their minds and reported for their hospital duty at the places assigned on the given day. There certainly would be no offense of failure to report committed. Whether a crime or not, the prior refusal would not prevent compliance. Likewise in the case before us the prior refusal was neither the failure to report nor did it preclude the possibility of committing this offense. We think it clear that here this offense was committed at the time and place the act should have been performed. Such a view has been expressed by federal courts applying the draft law.[20]

There is one further point which has to do with the Criminal Appeals Act, 18 U. S. C. § 3731 (1952). By that statute an appeal may be taken on behalf of the United

[16] Rumely v. McCarthy, 250 U. S. 283 (1919).

[17] United States v. Lombardo, 241 U. S. 73 (1916).

[18] New York Cent. & H. R. R. Co. v. United States, 166 F. 267 (2nd Cir. 1908).

[19] Bowles v. United States, 73 F. 2d 772, 774 (4th Cir. 1934), *cert. denied*, 294 U. S. 710 (1935); United States v. Commerford, 64 F. 2d 28, 32 (2nd Cir.), *cert. denied*, 289 U. S. 759 (1933).

[20] United States v. Van Den Berg, 139 F. 2d 654, 656 (7th Cir. 1944); Humes v. Pescor, 148 F. 2d 127, 128 (8th Cir. 1945); Jones v. Pescor, 169 F. 2d 853, 855 (8th Cir. 1948); United States v. Sutter, 127 F. Supp. 109, 115 (S. D. Cal. 1954); *contra* United States v. Patteson, 132 F. Supp. 67 (D. Kan. 1955); United States v. Chiarito, 69 F. Supp. 317, 322 (D. Ore. 1946) (alternative holding). Penor v. United States, 167 F. 2d 533 (9th Cir. 1948), is not in point. There the crime charged was desertion of the original camp rather than failure to report to the one newly assigned.

States to the Supreme Court of the United States from a judgment of a district court dismissing an indictment where the judgment "is based upon the invalidity or construction of the statute upon which the indictment . . . is founded." By the same section of the code an appeal may be taken by the United States to a court of appeals from a judgment of a district court setting aside or dismissing any indictment "except where a direct appeal to the Supreme Court of the United States is provided . . ." Under the statute, then, we do not have authority to hear the appeal if it is one which is appealable directly to the Supreme Court.

In *United States v. Jones*, 345 U. S. 377 (1953), the Court sent back to a court of appeals a case where appeal had been taken directly to the Supreme Court and where, in the view of that Court, there was a question of examining and construing the information. This the Supreme Court said was not properly a question for it but for the court of appeals instead. We think that case governs this. As set out above, there is a question of construing the indictments in this case to see what is being charged. And the only statutory question is whether such charges can be brought under the act, a question primarily involving the adequacy of the indictment rather than the construction of the statute. The case is, therefore, a proper one for consideration at this level and this consideration we have endeavored to give it.

The judgment of the district court will be reversed and the case remanded.

APPENDIX B

Opinion

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 17,804

United States of America

v.

Paul Deemer Johnston

Criminal No. 17,879

United States of America

v.

John Sokol

IX.

OPINION

(Filed March 17, 1955)

Ganey, J. March 17, 1955

Each of the defendant's motion to dismiss the indictment against him raises the troublesome question of venue-jurisdiction. Defendants were indicted for knowingly neglecting to perform a duty imposed upon them pursuant

to the provisions of the Universal Military Training and Service Act of 1948, 62 Stat. 604, as amended, 50 U. S. C. A. Appendix, § 451 et seq.

The defendant, Paul Deemer Johnston, resided in the Western District of Pennsylvania. He registered under the Act with his local draft board in that district, and throughout his selective proceedings he dealt only with selective service personnel there. He was finally given a I-O classification as a conscientious objector, which entitled him to perform two years of civilian work contributing to the national health in lieu of his being inducted into the armed forces. Subsequently the local board, in accordance with Selective Service regulations, notified him by mail in the western judicial district of Pennsylvania to report to it for the assignment of civilian work. He was instructed to report to the Norristown State Hospital located in the Eastern District of Pennsylvania, the judicial district of this court, on November 30, 1953. At the time of the assignment, he personally notified the board of his refusal to accept such employment. He has not entered this district to report for the assigned work.

The story of the other defendant, John Sokol, is parallel to that of defendant Johnston.

On the assumption that when the omission to perform a duty constitutes a crime, the venue is in the judicial district in which the duty should have been performed, the Government indicted the defendants in this district.[1]

Our problem, as in United States v. Anderson, 328 U. S. 699, 705 (1946), is to ascertain what duty it was, the failure to perform, that constituted the crime, and what acts of the defendants constituted the violation in order to determine where the crime was committed.

Clearly the duty in each case was to report to the State hospital, the place of performance, in this judicial district. However we think the violation was the defend-

[1] Cf: Fe tnote 14 on page 705 of United States v. Anderson, 328 U. S. 699 (1946).

ants' refusal to report to the place of performance. The refusal in both cases took place in the Western District of Pennsylvania, and not in this district where defendants were never physically present.[2] Penor v. United States, 9th Cir. 1948, 167 F. 2d 553, 555; United States v. Chiarito, D. C. Ore. 1946, 69 F. Supp. 317, 322-325.

Accordingly, the defendant's motion in each case to dismiss the indictment will be allowed for lack of jurisdiction.

[2] See footnote 11 on page 704 of United States v. Anderson, 328 U. S. 699, in which the Court pointed out that "the Department of Justice in 1942 had instructed United States Attorneys that, in cases of failure to report for induction, 'venue is in the district where the subject was ordered to report', *apparently without regard to whether he had been present physically there.*" (Italics supplied.)

APPENDIX C

Judgment—Johnston Case

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,620

UNITED STATES OF AMERICA,

Appellant,

vs.

PAUL DEEMER JOHNSTON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: GOODRICH, STALEY and HASTIE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the case remanded to the United States District Court for the Eastern District of Pennsylvania.

Attest:

IDA O. CRESKOFF
Clerk

December 1, 1955

Judgment—Sokol Case

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,621

UNITED STATES OF AMERICA,

Appellant,

vs.

JOHN SOKOL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: GOODRICH, STALEY and HASTIE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the case remanded to the United States District Court for the Eastern District of Pennsylvania.

Attest:

IDA O. CRESKOFF
Clerk

December 1, 1955

APPENDIX B

Sur Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,620

UNITED STATES OF AMERICA,

Appellant

vs.

PAUL DEEMER JOHNSTON

No. 11,621

UNITED STATES OF AMERICA,

Appellant

vs.

JOHN SOKOL

SUR PETITION FOR REHEARING

Present: GOODRICH, STALEY and HASTIE, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

BY THE COURT

[signed] Goodrich
HERBERT F. GOODRICH

Dated:

January 4, 1956

APPENDIX E

Selective Service Material

Universal Military Training and Service Act, as Amended

Title I

Section 6 (j) of the Act

Section 6 (j) of the act (50 U. S. C. App. § 456 (j), 65 Stat. 75, 83, 86) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant

training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."

Section 12 (a) of the Act

Section 12 (a) of the act (50 U. S. C. App. § 462 (a), 62 Stat. 622) provides:

". . . Any . . . person . . . who . . . refuses . . . service in the armed forces . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . . ."

Section 1660.1 of the Regulations

Section 1660.1 of the Selective Service Regulations (32 C. F. R. § 1660.1) (E. O. 10328, 17 F. R. 1650, Feb. 22, 1952) provides:

"*Definition of Appropriate Civilian Work.*—(a) The types of employment which may be considered under the provisions of section 6 (j) of title I of the Universal Military Training and Service Act, as amended, to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O shall be limited to the following:

"(1) Employment by the United States Government, or by a State, Territory, or possession of the United States or by a political subdivision thereof, or by the District of Columbia.

"(2) Employment by a nonprofit organization, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when

such activity or program is not principally for the benefit of the members of such organization, association, or corporation, or for increasing the membership thereof.

"(b) Except as provided in subparagraph (2) of paragraph (a) of this section, work in private employment shall not be considered to be appropriate civilian work to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O."

Section 1660.20 of the Regulations

Section 1660.20 of the Selective Service Regulations (32 C. F. R. § 1660.20) (E. O. 10328, 17 F. R. 1650, Feb. 22, 1952) provides:

"Determination of Type of Civilian Work to Be Performed and Order by the Local Board to Perform Such Work.—(a) When a registrant in Class I-O is found acceptable for service after his armed forces physical examination or when such a registrant has failed to report for or to submit to armed forces physical examination, he shall, within ten days after notice of acceptability is mailed to him by the local board or within ten days after he has failed to report for or submit to armed forces physical examination, submit to the local board three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1, which he is qualified to do and which he offers to perform in lieu of induction into the armed forces. If the local board deems any one of these types of work to be appropriate, it will order the registrant to perform such work, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

"(b) If the registrant fails to submit to the local board types of work which he offers to perform, or if the local board finds that none of the types of work submitted by

the registrant is appropriate, the local board shall submit to the registrant by letter three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate for the registrant to perform in lieu of induction. The registrant, within ten days after such letter is mailed to him by the local board, shall file with the board a statement that he either offers to perform one of the types of work submitted by the board, or that he does not offer to perform any of such types of work. If the registrant offers to perform any one of the three types of work, he shall be ordered by the local board to perform such work in lieu of induction, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

"(c) If the local board and the registrant are unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the State Director of Selective Service for the State in which the local board is located, or the representative of such State Director, appointed by him for the purpose, shall meet with the local board and the registrant and offer his assistance in reaching an agreement. The local board shall mail to the registrant a notice of the time and place of this meeting at least 10 days before the date of the meeting. If agreement is reached at this meeting, the registrant shall be ordered by the local board to perform work in lieu of induction in accordance with such agreement, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

"(d) If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon a type of civilian work which

should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work."

Section 1660.30 of the Regulations

Section 1660.30 of the Selective Service Regulations (32 C. F. R. § 1660.30) (E. O. 10328, 17 F. R. 1650, Feb. 22, 1952) provides as follows:

"*Failure or Neglect to Obey Order to Perform Civilian Work.*—Any registrant who knowingly fails or neglects to obey an order from his local board to perform civilian work contributing to the maintenance of the national health, safety, or interest in lieu of induction shall be deemed to have knowingly failed or neglected to perform a duty required of him under title I of the Universal Military Training and Service Act, as amended. When any registrant fails or neglects to obey any such order, his Cover Sheet (SSS Form No. 101) and contents shall be forwarded to the Director of Selective Service for a determination as to whether or not the registrant shall be reported to the Department of Justice for prosecution."

Section 1660.31 of the Regulations

Section 1660.31 of the Selective Service Regulations (32 C. F. R. § 1660.31) (E. O. 10328, 17 F. R. 1650, Feb. 22, 1952, except as otherwise noted) provides as follows:

"*Administration of Registrants While Performing Civilian Work.*—(a) After a registrant who has been clas-

sified in Class I-O reports in response to an order from his local board for civilian work in lieu of induction and he has been classified in Class I-W, his Cover Sheet (SSS Form No. 101) and contents shall be forwarded to the State Director of Selective Service for the State in which the work is being performed. It shall be the responsibility of such State Director of Selective Service to see that the registrant performs the work to which he has been ordered by the local board for a period of twenty-four consecutive months, unless sooner released under the provision of section 1660.21. When the registrant has satisfactorily completed this work, the State Director of Selective Service shall return the registrant's cover sheet to the local board together with a letter stating that the registrant has satisfactorily completed his work. If the registrant should fail to perform such work, or should otherwise fail to perform his duties under title I of the Universal Military Training and Service Act, as amended, during the time that his cover sheet is in the custody of the State Director of Selective Service, the State Director of Selective Service shall forward the cover sheet to the Director of Selective Service for a determination as to whether or not the registrant shall be reported to the Department of Justice for prosecution."

(b) When the civilian work to which a registrant is ordered by the local board in lieu of induction is to be performed at any place outside of the continental limits of the United States, the Territories of Alaska and Hawaii, Puerto Rico, the Virgin Islands, Guam, and the Canal Zone, and the registrant has reported for such work, the local board, after classifying the registrant in Class I-W, shall forward the registrant's Cover Sheet (SSS Form No. 101) and contents to the Director of Selective Service. It shall be the responsibility of the Director of Selective Service to see that the registrant performs the work to which he has been ordered by the local board for a period of twenty-four consecutive months, unless sooner released

under the provisions of § 1660.21. When the registrant has satisfactorily completed this work, the Director of Selective Service shall return the registrant's cover sheet to the local board together with a letter stating that the registrant has satisfactorily completed his work. If the registrant should fail to perform such work, or should otherwise fail to perform his duties under title I of the Universal Military Training and Service Act, as amended, during the time that his cover sheet is in the custody of the Director of Selective Service, the Director of Selective Service shall determine whether or not the registrant shall be reported to the Department of Justice for prosecution.

"(c) When the local board receives the cover sheet of the registrant from the Director of Selective Service or the State Director of Selective Service together with the letter stating that the registrant has satisfactorily completed his period of civilian work or a written notification that the registrant has been sooner released from such work by the Director of Selective Service under the provisions of § 1660.21, the local board shall mail the registrant a certificate evidencing his satisfactory completion of and release from civilian work and shall retain him in Class I-W and identify him on all records by following his classification with the abbreviation 'Rel.' until such time as he attains an age beyond the maximum age of liability for military service."

[Paragraph (c) amended by E. O. 10420, 17 F. R. 11593, Dec. 19, 1952]

APPENDIX F

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 5193 - NOVEMBER TERM, 1955

UNITED STATES OF AMERICA,
Appellant,

v.

DUDLEY A. PATTESON,
Appellee.

Appeal from the United States District Court for the District of Kansas.

Selby S. Soward (William C. Farmer, U. S. Attorney, was with him on the brief), for appellant.

Hayden C. Covington, for appellee.

Before MURRAH, and PICKETT, Circuit Judges, and RICE, District Judge.

PICKETT, Circuit Judge.

The question presented by this appeal is one of jurisdiction in a prosecution for violation of the provisions of the Universal Military Training and Service Act. (50 U. S. C. A. App. Sec. 451 et seq.) The defendant Patteson, a resident of Oklahoma City, Oklahoma, registered with the local Selective Service Board and was classified 1-O.

This classification is one designated for those who are conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces of the United States. 50 U. S. C. A. App. Sec. 456(j). In lieu of induction, the local board ordered Patteson to report to it on July 26, 1954, to receive instructions for civilian work contributing to the maintenance of the national health, safety or interest at the Topeka State Hospital in Topeka, Kansas. In compliance with the order, he reported to the local board and there notified the board that he would not proceed to Topeka for the performance of the required civilian work. He never left the State of Oklahoma.

On October 7, 1954, the defendant was indicted in the United States District Court for th District of Kansas for violation of 50 U. S. C. A. Sec. 462. The indictment charged that the defendant did knowingly and willfully refuse, neglect and fail to report to the Topeka Hospital as ordered by the local board. The District Court dismissed the indictment on the ground that the offense was not committed in Kansas. 132 F. Supp. 67. The United States has appealed.

Section 12 of the Act (50 U. S. C. A. Sec. 462(a)) provides that any person "charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, *** shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment." The Sixth Amendment to the Constitution of the United States requires that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial "by an impartial jury of the State and district wherein the crime shall have been committed, *** ." The question narrows itself to that of where was the crime committed.

The United States argues that the order of the local board required Patteson to report at the Topeka Hospital; that his omission or failure to report there was the act which constituted the violation; and that the crime was committed in Kansas by this omission or failure. It relies upon decisions which uphold jurisdiction of prosecutions in the districts where a statute requires an act to be done.[1] Generally, these cases hold that when an omission or failure to act constitutes a crime, the jurisdiction of a prosecution for a violation is in the district where the act should have been performed, even though the person charged was not physically present in that district at the time of the omission or failure. The Third Circuit in United States v. Johnston, — F. 2d. —, adopted this analogy and held in a case similar to the one before this court that jurisdiction was at the place where the conscientious objector was ordered to report. We do not think that the offense was an act of omission or an offense of misfeasance or malfeasance which would pass from one jurisdiction to another, but a refusal to take a positive step in the process of induction or assignment to civilian work and that this refusal was in Oklahoma.

As is pointed out in United States v. Anderson, 328 U. S. 699, "The constitutional specification is geographic; and the geography prescribed is the district or districts within which the offense is committed. This may or may not be the place where the defendant resides; where the draft board is located; or where the duty violated would be performed, if performed in full. The places of residence, of the draft board's location, of final and complete performance, all my [sic] be situated in districts different from that where the criminal act is done. When they so differ, it is the latter, not any of the former, which determines the jurisdiction." (footnotes omitted).

[1] See Rumely v. McCarthy, 250 U. S. 283; United States v. Lombardo, 241 U. S. 73; United States v. Commerford, 2 Cir., 64 F. 2d. 28, cert. den. 289 U. S. 759; N. Y. Central and H. R. R. Co. v. United States, 2 Cir., 186 F. 2d. 267; State v. Peabody, 25 R. I. 54, 56 Atl. 1028.

So far as compliance with the requirements of the Act or the regulations is concerned, the conscientious objector is in no different position than any other person subject to its provisions. Induction into the service is the end product of submission to the Selective Service process and compliance with the orders of the local board. Billings v. Truesdale, 321 U. S. 542. Induction is brought about by a continuous process of steps beginning with registration, and it ends when the registrant is accepted into the military service or enters into civilian work. A wilful refusal of those affected by the Act to take any one of the necessary steps constitutes a violation. Gibson v. United States, 329 U. S. 338; Billings v. Truesdale, supra; Falbo v. United States, 320 U. S. 549; Hudson v. United States, 10 Cir., 157 F. 2d 782, cert. den. 329 U. S. 813; Shigeru Fujii v. United States, 10 Cir., 148 F. 2d. 298, cert. den. 325 U. S. 868; Berman v. United States, 9 Cir., 156 F. 2d. 377, cert. den. 329 U. S. 795.

Patteson had taken all the required steps in the process of induction up to compliance with the local board's order which required him to report to it for assignment to Topeka, Kansas for civilian work in lieu of induction into the armed forces. The duty required of him by the order was to proceed to Topeka. This was no more than a necessary intermediate step in the continuous process, the ultimate purpose of which was to get Patteson into civilian work. Falbo v. United States, supra. It seems to us quite clear that his refusal to take this step occurred when he notified his local board in Oklahoma that he would go no further. Had he proceeded to Topeka and then refused to do the assigned work, a separate offense would have been committed. Gibson v. United States, supra; United States v. Anderson, supra. In Dodez v. United States, 329 U. S. 338; and Jeffries v. United States, 10 Cir., 169 F. 2d. 86, prosecutions were had in the district where the board was located when the registrants refused to report for work of national

importance after being ordered to do so, and the jurisdiction of the courts was not questioned.[2]

Jurisdiction as contended for by the United States might require a conscientious objector who refused to obey the local board's order to go to a distant state or territory of the United States, or even outside the continental limits of the United States, where he had never been, to defend a prosecution for an act, that is a refusal to proceed, which occurred in his home district. This, of course, would not determine jurisdiction if the crime was actually committed elsewhere, but as was said in United States v. Johnson, 323 U. S. 273, "Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the Constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."

Affirmed.

[2] In the Jeffries Case, the court said:

"Clearly, the duty of Jeffries to report embraced more than putting in an appearance at the time and place designated in the order. It included a willingness to be assigned to work of national importance under civilian direction and to go to the camp to which he had been assigned.

"The appearance of Jeffries at the office of the Local Board at the time indicated in the order with the intent and purpose not to accept assignment to work of national importance and not to go to the camp to which he had been assigned was as much a noncompliance with the order as if he had not appeared at the office of the Local Board."

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 643

PAUL DEEMER JOHNSTON AND JOHN SOKOL,
Petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 704

UNITED STATES OF AMERICA, Petitioner

v.

DUDLEY A. PATTESON

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT BRIEF FOR PETITIONERS JOHNSTON AND SOKOL AND RESPONDENT PATTESON

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit in *United States* v. *Johnston and Sokol* is reported

at 227 F. 2d 745. It also appears in the record. [RJ 11][1] The opinion is in the petition for writ of certiorari at pages 19-24. An opinion was written by the District Court. (See *United States* v. *Johnston*, E. D. Pa., 131 F. Supp. 955 (1955).) This opinion appears in the record. [RJ 8] It also appears in the petition for writ of certiorari (No. 643) at pages 25-27.

The opinion of the Court of Appeals for the Tenth Circuit in *United States* v. *Patteson*, Jan. 19, 1956, is not yet reported. It appears in the record. [RP 10-13] It also appears in the petition for writ of certiorari (No. 704) at pages 1a-6a. The opinion of the District Court for the District of Kansas in *United States* v. *Patteson* is reported at 132 F. Supp. 67. It also appears in the record in that case. [RP 6-8]

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit in *United States* v. *Johnston* and *United States* v. *Sokol* was entered on December 1, 1955. [RJ 18, 19] The court extended the time in which to file a petition for rehearing. It was filed in time and denied on January 4, 1956. [RJ 20] A joint petition for writ of certiorari was filed in the *Johnston* and *Sokol* cases on January 26, 1956 (No. 643). This Court granted the writ of certiorari on March 5, 1956.

The judgment of the Court of Appeals for the Tenth Circuit was entered in *United States* v. *Patteson* on January 19, 1956. [RP 13] The petition for writ of certiorari was filed on February 17, 1956 (No. 704). The writ was granted on March 5, 1956.

The jurisdiction of this Court in all three cases is invoked under 28 U. S. C. § 1254 (1). (See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.)

[1] Numbers herein within brackets preceded by "RJ" refer to pages of printed record in Johnston and Sokol cases (No. 643). Numbers herein within brackets preceded by "RP" refer to pages of printed record in Patteson case (No. 704).

The District Court in each of these cases had jurisdiction under 18 U. S. C. § 3231.

QUESTION PRESENTED

Whether jurisdiction and venue of the crime alleged in each indictment, of refusing, failing or neglecting to obey an order of a local board of the Selective Service System to a conscientious objector to report for civilian work pursuant to Section 6 (j) of the Universal Military Training and Service Act, are fixed in the district where the work was to be performed or in the district where the registrant reported to his local board and there refused to proceed out of the district and to the hospital where he was ordered to perform civilian work.

STATUTE INVOLVED

The pertinent portions of the Universal Military Training and Service Act, 62 Stat. 604, as amended, 65 Stat. 75, provide:

Section 6 (j) of the Act (50 U. S. C. App. § 456 (j)):

> . . . Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, . . . if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly

> . . failed or neglected to perform a duty required of him under this title. . . .

Section 12 (a) of the Act (50 U. S. C. App. § 462 (a)):

> . . . Any . . . person . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . .

REGULATIONS INVOLVED

Sections 1660.1, 1660.20, 1660.30 and 1660.31 of the Regulations (32 C. F. R. §§ 1660.1, 1660.20, 1660.30 and 1660.31) are involved. These are extensive provisions which are printed as Appendix A, *infra*, pages 40-45.

STATEMENT OF THE CASES

Petitioners Johnston and Sokol were indicted respectively on May 25, 1954, and July 28, 1954, in the United States District Court for the Eastern District of Pennsylvania. [RJ 3, 4] The indictment in the *Johnston* case charged that he did "knowingly neglect to perform a duty imposed upon him by the provisions of said Act in that he failed and refused to obey an order of Local Board 87, New Castle, Pennsylvania, directing him to report for employment at Norristown State Hospital, Norristown, Pennsylvania, and to remain employed there for twenty-four consecutive months in violation of Title 50, U. S. C. Appx., Sections 456 and 462, as amended." [RJ 4]

The indictment in the *Sokol* case charged that "he failed to report to the Philadelphia State Hospital, Roosevelt Boulevard and Southampton Road, Philadelphia, Pennsyl-

vania, for assignment to perform civilian work contributing to the maintenance of the national health, safety or interest, in lieu of induction; in violation of Title 50 Appx. Secs. 456(j) and 462." [RJ 3-4]

The indictment in the *Patteson* case was returned in the United States District Court for the District of Kansas on October 7, 1954. It charged that he "having registered with Local Board No. 57 for Oklahoma County, Oklahoma, and having been classified by said Board I-O, and the said Board having issued an order, duly mailed to him, for the said Dudley A. Patteson ordering him to report on July 26, 1954, for civilian work contributing to the maintenance of the national health, safety and interest as the said Board deemed appropriate, and he, the said Dudley A. Patteson, did knowingly and willfully refuse, neglect and fail to report at the Topeka State Hospital at the time and place so designated in said order." [RP 1]

Motions to dismiss the indictments were filed in the *Johnston* and *Sokol* cases on November 5, 1954. [RJ 5] A motion to dismiss was filed in the *Patteson* case May 13, 1955 [RP 3-4] The basis for each motion to dismiss was that the District Court was without jurisdiction to prosecute the offense. [RJ 5; RP 4]

The defendants Johnston and Sokol in the District Court showed that they registered with their local draft boards located in the Western District of Pennsylvania. [RJ 6, 7] Each at all times resided in the Western District of Pennsylvania. [RJ 6, 7] After each man was classified as a conscientious objector the local boards ordered them in the Western District of Pennsylvania to report to them for assignment to civilian work in lieu of induction. [RJ 6, 7] Each man "personally reported to his local board as requested" by the local boards in their orders. [RJ 6, 7] Each man "personally refused to accept" the work ordered to be done by the local boards. Johnston filed a statement with his board that "he could not conscientiously accept the work assigned to him." [RJ 6, 7] Sokol orally informed

his board the grounds for his refusal after reporting. [RJ 6] Both Johnston and Sokol never left the Western District of Pennsylvania or entered the Eastern District of Pennsylvania for the purpose of performing the work assigned to them. [RJ 6,7]

An order was entered by the District Court for the District of Kansas pursuant to Rule 21 (b) of the Federal Rules of Criminal Procedure transferring the *Patteson* case to the Western District of Oklahoma on March 21, 1955. [RP 2] When the case reached the United States District Court for the Western District of Oklahoma, an order was entered by that court transferring the case back to the United States District Court for the District of Kansas. [RP 3]

When the indictment was called for trial in the District of Kansas a motion to dismiss the indictment was made. In that motion it was stated:

> "... He registered under the act with his local board in Oklahoma City. Throughout his entire processing he dealt only with the selective service officials in the State of Oklahoma. He was finally ordered by the Oklahoma City board to perform work at the Topeka State Hospital at Topeka, Kansas. He reported at his local board in Oklahoma City and personally notified the board that he would refuse to accept such employment at the Topeka State Hospital. He never at any time reported at the Topeka State Hospital. He never left the State of Oklahoma or the Western District of Oklahoma to report for the assigned work. The failure to perform the duty that constitutes the offense occurred in the State of Oklahoma. The refusal to report to the hospital was an act that was committed in the Western District of Oklahoma and not in the District of Kansas." [RP 3-4]

The affidavit supporting the motion showed:

> "All of the witnesses that will have to give testimony in the case reside in Oklahoma City. The defendant will be put unjustly to the expense and trouble of getting witnesses brought from Oklahoma City. He may not be able to get his witnesses and evidence ready in time for trial because of the distance and the fact that the witnesses all reside beyond the jurisdiction of this Court. It works a hardship on him to try the case in this Court because he will pay [sic, have] to pay travel fees and other expenses for the attendance of witnesses which will be prohibitive and make it impossible to prove his defenses." [RP 4]

Upon a consideration of the motions to dismiss the indictments each district court sustained the motion to dismiss and the three indictments were ordered dismissed. [RJ 8-9, 10; RP 9] Opinions were written in all three cases giving reasons for the dismissals by the district courts. [RJ 8-9; RP 6-8]

The Government took appeals. In the *Johnston* and *Sokol* cases (No. 643) it appealed to the Third Circuit. In the *Patteson* case (No. 704) it appealed to the Tenth Circuit. The Third Circuit reversed and remanded the judgments dismissing the indictments in the *Johnston* and *Sokol* cases. [RJ 17-19] The Tenth Circuit affirmed the judgment of the District of Kansas ordering the indictment dismissed. [RP 13]. The three cases are now before this Court upon petitions for writs of certiorari which have been granted. [RJ 20; RP 14]

SUMMARY OF ARGUMENT

The offense in each case was committed in the district where the local board was located because it was there that each selectee refused to take the next step in the Selective Service process by proceeding to the hospital and, since no refusal or act of omission or commission was committed by each selectee in the district where the hospital was located, such district in each case did not have jurisdiction because of the mandate of the United States Constitution, Article III, Section 2, and the Sixth Amendment.

The constitutional provisions of Article III and the Sixth Amendment, in fixing venue, base it upon the right of trial by jury. The guarantee of a jury trial intended under the Constitution is nullified if the offense is not tried in the district where the facts occur. It is where the controversy occurs and results in the prosecution that fixes the place of the jury trial.

Grave abuses of the place of criminal trials gave rise to the Revolutionary War. Some of the authors of the provisions of the Constitution had previously declared their grievances in the Declaration of Independence. They emphasized a trial by a jury of the vicinage as a guarantee against the outrages committed against the colonists by the British.—Connor, "The Constitutional Right to a Trial by a Jury of the Vicinage," 57 Univ. Pa. L. Rev. 197-198, 207-215 (1909); Blume, "The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue," 43 Mich. L. Rev. 59 (1944); see also *State* v. *Albee*, 61 N. H. 423 (1881); *Commonwealth* v. *Parker*, 19 Mass. (2 Pick.) 459 (1824).

The Court of Appeals for the Third Circuit in *United States* v. *Johnston and Sokol*, 227 F. 2d 745 (Dec. 1, 1955), overlooked the hardship of putting a selectee classified as a conscientious objector to trial at the place of the hospital. Since a conscientious objector on the east coast of the United States under the law may be ordered to work in Alaska or Hawaii, the fixing of jurisdiction in such places

of work manifestly resurrects the condemned practice of transporting citizens to a faraway place for trial, as was done by the British before the Revolutionary War.

The Act and the regulations (50 U. S. C. App. §§ 451-470; 32 C. F. R. § 1602, *et seq.*) definitely distinguish the different offenses that may be committed. It is the defiance of any one of several separate orders that may constitute an offense under the Act. This Court has declared that the entire Selective Service process is a series of separate but connected links in the chain.—*Falbo* v. *United States*, 320 U. S. 549 (1944); *Billings* v. *Truesdell*, 321 U. S. 542 (1944).

The regulations also show that there are several separate acts that a conscientious objector is required to perform in the chain of events beginning with registration and ending with performance of the work at the hospital.—See Part 1660 of the Selective Service Regulations, 32 C. F. R. §§ 1660.1-1660.31.

The refusal on the part of the conscientious objector to perform any one of these acts constitutes an offense. All of the acts required to be performed, except the last one—performance of the work at the hospital—are required to be performed at the place where the local board is located. The act of assignment to the work and the order for performance of it at the hospital begins at the local board. A refusal to take this last step, which begins at the local board, occurs in the district where the local board is located. This dividing line is emphasized by the regulation that provides for the transfer of the file of the registrant from the State Director having jurisdiction over his local board to the State Director having jurisdiction over the place where the work is to be performed.—32 C. F. R. § 1660.31 (a).

The distinction between the offenses committed in these three cases and the offense of leaving the place of employment is emphasized in the policy of the Department of Justice in *Dodez* v. *United States*, 329 U. S. 338 (1946), and

Gibson v. *United States*, 329 U. S. 338 (1946); see also *Jeffries* v. *United States*, 10th Cir., 169 F. 2d 86 (1947). In the *Dodez* case, *supra*; the registrant wrote the local board a letter stating his refusal to report to the civilian public service camp to do work as a conscientious objector. He was prosecuted in the district where the local board was located. This also happened in *Jeffries* v. *United States*, *supra*, but in the *Gibson* case, *supra*, the prosecution was launched in the district where the camp was located. There Gibson left the camp after reporting and registering in for the work. Under the present act if a registrant classified for performance of military service reports to the local board, but refuses to go forward to the induction station where he has been ordered to submit to induction into the armed forces, the prosecution has always been, and now continues to be, brought by the Government in the district where the local board is located. (*Falbo* v. *United States*, 320 U. S. 549 (1944)) The situation in these three cases is identical to the case of the refusal of the selectee to go forward to the induction station and submit to induction.

The Government undertakes a specious but faulty distinction between the *Dodez* case (329 U.S. 338 (1946)) and these cases. It is argued in the *Dodez* case that the Government paid the expense of travel and, since the registrant had to report to the board to get his transportation ticket, this makes the case different. But venue in these cases is not to be determined according to who pays the travel expense. The same act that fixed jurisdiction under the 1940 law (50 U. S. C. App. §§ 301-318) establishes it under the present Act—50 U. S. C. App. §§ 451-470.

It is the refusal to leave the local board and continue on in the process by beginning and completing the link of travel from the place where the local board is located to the place where the civilian work is to be performed. The refusal to take this integrated step constitutes the dividing line. This nonaction or defiance of the order to take the next step occurs in the district where the local board is located

and not where the hospital is located. The thin veil of who pays the travel expense that the Government wraps around the *Dodez* case (329 U. S. 338) should not conceal from this Court the similarity of the situation and the facts in these cases.

The analogy made by the Court of Appeals for the Third Circuit in *United States* v. *Johnston and Sokol,* 227 F. 2d 747, between these cases and the case of shooting across a state line in venue cases in unfounded. There also is no similarity between these cases and cases involving use of the mails to defraud, shipment of impure food and other similar offenses. Such acts relied upon by the court below were affirmative acts that pass from one jurisdiction to another. Here the nonaction of the selectees did not go outside the districts where the local boards are located.

The cases involving failure to file income tax returns and the refusal to file reports with administrative agencies are likewise not in point. These are relied upon in *United States* v. *Johnston and Sokol,* 227 F. 2d 745, 747, 748. In those cases the administrative agency that issued the order, or in whose behalf the order was made by an act of Congress, was located in the district where each prosecution was brought. The location of the administrative tribunal in these cases is in a district other than where the prosecution was brought.

The Court of Appeals for the Third Circuit in *United States* v. *Johnston and Sokol,* 227 F. 2d 747, 748, relies on the cases involving prosecution for nonsupport of children. These cases are not in point. The obligation to support children is entirely transitory. It follows the children wherever they may go. The nonsupport cases are peculiarly distinguishable from the situation in cases of this sort. (See 6 Stanford L. Rev. 709 (1954)) The nonsupport cases involve a question of venue between counties in a state. The nonsupport cases do not involve jurisdiction problems such as those presented here under Article III of the Constitution and the Sixth Amendment. Here the jurisdic-

tional problem goes back to the basic objection to the abuses practiced by the British before the Revolutionary War —not counties but districts, states and countries. The non-support cases do not involve such jurisdictional problems made here by the Constitution.

The Court of Appeals for the Third Circuit in *United States* v. *Johnston and Sokol,* 227 F. 2d 747, 748, relies on *Regina* v. *Milner,* 2 Car. & K. 309, 175 Eng. Rep. 128 (1846). In that case, which is in point, the defendant was ordered to appear before a bankruptcy court in Birmingham. The criminal court where the bankruptcy court was located had jurisdiction. This supports the proposition that the court where the local board in located has jurisdiction. In that case the defendant argued that it was the place of his residence that determined the venue. The registrants in these cases do not say that it is the place of residence that fixes jurisdiction. It is the place where the offense was committed, the refusal occurred, which is where the local boards are located, that prescribes it.

The argument of the Government that *United States* v. *Patteson,* 10th Cir., — F. 2d — (Jan. 19, 1956), is based on an erroneous assumption is incorrect. It is said that the Court of Appeals for the Tenth Circuit hinged its decision upon the place where the statement of refusal was made or the letter of defiance was directed to the local board. It is the act of refusal to take the next step that determines the place of the offense and not the subsidiary or evidentiary statement of declaration that determines the issue. A registrant may violate the Act by refusing to take the step from the local board forward to the hospital even without declaring his intent either orally or in writing. The Court of Appeals for the Tenth Circuit did not thus narrow its holding.

The argument of the Government that the omission of the word "refusal" from 50 U. S. C. App. § 456 (j) is crucial entirely overlooks Section 12 (a) of the Act which is determinative. Section 6 (j) is merely declaratory. It em-

phasizes that the conscientious objector is a violator of the law as well as anyone who refuses to comply with local board orders. Section 12 (a) (50 U.S.C. App. § 462 (a)) uses the word "refuse" as well as the words "fail" and "neglect." This sanctions clause of the Act is the one that is involved here, to determine jurisdiction, and not the declaratory clause of Section 6 (j). Moreover, Section 6 (j) of the Act does not limit the provisions of Section 12 (a).

The suggestion is made by the Government that it is necessary to report to the hospital in order to exhaust administrative remedies. The Government then jumps to the unsupported conclusion that, since the registrant has not exhausted his administrative remedies at the local board, the place of refusal, the jurisdiction must necessarily be at the place where the work is to be performed. Administrative remedies are exhausted long before the conscientious objector is ordered to go to the hospital. He is given an armed forces physical examination before the order to do civilian work issues. It is this examination that completes the selective process. (*Dodez* v. *United States*, 329 U.S. 338 (1946); see *United States* v. *Thomas*, E. D. Ill., 124 F. Supp. 411 (1954).) Even though the registrants failed to exhaust their administrative remedies, which the Government erroneously claims, such issue is wholly irrelevant to the question of jurisdiction. Venue here is based on where the refusal took place irrespective of any supposed failure to exhaust administrative remedies.

The Congress of the United States has not specifically fixed venue in cases of this kind. Section 12 (a) of the Act (50 U.S.C. App. § 462 (a)) gives jurisdiction to the district court wherever the refusal took place. The court must depend on the general law of venue rather than specific provisions of the Act to determine the place of trial. The vicinage of trial is always determined with a leaning toward the advantage of the citizen under Article III to the United States Constitution and the Sixth Amendment, rather than pulling away from it. The construction "should go in the

direction of constitutional policy even though not commanded by it."—*United States* v. *Johnson*, 323 U. S. 273, 276, 279 (1944).

The place of refusal determines the jurisdiction. The step in the selective process that the selectees in these cases refused to take began in the districts where the local boards are located. The refusal of each to proceed with this link of the chain occurred in the districts where the local boards are located. The offense in each of these cases was, therefore, committed in the district where the local board was located. This holding is commanded by the Constitution, Article III, Section 2, and the Sixth Amendment.

United States v. *Johnston and Sokol*, 3rd Cir., 227 F. 2d 745 (Dec. 1, 1955), should, therefore, be reversed and *United States* v. *Patteson*, 10th Cir., — F. 2d — (Jan. 19, 1956), should be affirmed.

ARGUMENT

The offense in each case was committed in the district where the local board was located because it was there that each selectee refused to take the next step in the Selective Service process by proceeding to the hospital and, since no refusal or act of omission or commission was committed by each selectee in the district where the hospital was located, such district in each case did not have jurisdiction because of the mandate of the United States Constitution, Article III, Section 2, and the Sixth Amendment.

Article III, Section 2, of the United States Constitution provides in part as follows:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; . . ."

The Sixth Amendment to the United States Constitution reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Some of the founding fathers who wrote the Constitution were authors of grievances expressed in the Declaration of Independence against the British Government. The greatest grievance that triggered the Revolutionary War, which set off the shot heard around the world, was the British practice of taking American colonists from America to England and there putting them to trial—over 3,000 miles from the place where the offense was committed. From Massachusetts to Georgia the colonists protested against this outrageous practice. They maintained that they could be tried only by a jury of the vicinage.—Connor, "The Constitutional Right to a Trial by a Jury of the Vicinage," 57 Univ. Pa. L. Rev. 197-198, 207-215 (1909); Blume, "The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue," 43 Mich. L. Rev. 59 (1944).

A reading of the Article and the Amendment shows that exclusive venue in the district where the crime was committed is a concomitant of the right of trial by jury. The right is double-barreled. One should not be fired without the other. The trial of a crime in a district other than in the place where it was committed defeats the right of trial by jury contemplated by the framers of the Constitution. The authors of Article III and the Sixth Amendment had in mind the prerogative of the people of England stated in the Magna Charta concerning the right of trial by jury. *Jury trial* in England from time immemorial contemplated *a jury of the vicinage*.

A jury taken from a district other than where the crime was committed is not a jury of the vicinage. The authors of the Constitution, Article III and the Sixth Amendment, had in mind these ancient English heritages when they guaranteed the right of trial by a jury of the vicinage. It is because of this dual nature of the right that we find in the Constitution the right of trial by jury mentioned in the same sentence with the right of trial in the district where the crime was committed.

The right of trial by jury of the vicinage was discussed in *State* v. *Albee*, 61 N. H. 423 (1881). In that case Justice Smith, speaking for the court, said:

> "... Men who had enjoyed this protection under the British crown would not be likely to surrender it after engaging in an exhaustive war for seven years to establish their independence. One of their grievances was the trampling under foot of the time-honored principle that trials for crime must be by a jury of the vicinage."—61 N. H. 427-428.

In *Commonwealth* v. *Parker*, 19 Mass. (2 Pick.) 549 (1824), Chief Justice Parker for the Supreme Judicial Court of Massachusetts said that the constitutional mandate of the right of trial by jury from the vicinage—

> "... is merely declaratory of the sense of the people, that the proof of facts in criminal prosecutions should be in the vicinity or neighborhood where they happen. ... This being the state of things at the time of the adoption of the constitution ... it may well be supposed that the wise men who framed the declaration of rights, when they proposed to the people to declare, that 'in criminal trials, the verification of facts in the vicinity where they happen, is one of the greatest securities of the life, liberty and property of the citizen,' intended to hold out a caution to all future

legislatures to regard this principle in their laws concerning crimes and punishments . . ."—19 Mass. (2 Pick.) at pages 552, 554.

In 1909 Mr. Justice Connor of the Supreme Court of North Carolina in his article, "The Constitutional Right to a Trial by a Jury of the Vicinage," 57 Univ. Pa. L. Rev. 197, 215 (1909) said:

> ". . . If, as many thoughtful men think, our criminal laws are either so defective, or so weak in their administration that radical changes should be made, it would be wise to remove doubt from constitutional provisions, so that legislative action will not conflict with them. If we have outgrown Magna Carta, and limitations on government should be removed and new modes of trial, with more expeditious and less restrictive criminal procedure should be established, let the Constitutions be so amended that the Courts will not find themselves compelled either to construe them away or invalidate legislation. While ours is a government by the people, of the people and for the people, it is an equally important truth that the people govern by agencies of their own creation, subject to the limitations imposed upon them by the supreme law, beyond which they should neither be required nor permitted to go, certainly if the law is essential to stability of the State and the safety of the citizen."

The Court of Appeals for the Third Circuit in *United States* v. *Johnston and Sokol*, 227 F. 2d 745 (Dec. 1, 1955), disregarded completely the harshness and injustice that a defendant in a case of this sort can be put to. The court failed to pay attention to the fact that a local board on the eastern coast of the United States could order a registrant living in the eastern states to report for civilian work on the west coast or in Hawaii or Alaska. He could then be

prosecuted in those remote places where he had never gone.

The court in the *Johnston* case (227 F. 2d 745) overlooked the fact that the Government would be in a position to transport its witnesses all the way across the continent or to any other place, but the defendant—in most if not in all cases—would be absolutely deprived of witnesses to corroborate his defenses or prove his good character. When the Court of Appeals for the Third Circuit in the *Johnston* and *Sokol* cases (227 F. 2d 745) gave the Government such power in cases such as these, it created an alien principle that gives rise to a repetition of the grievance complained of by the American colonists against the British crown prior to the American Revolution.

To emphasize the error, consider the following: Under the law a conscientious objector can be ordered to do work outside the continental United States and its possessions. The conscientious objector may be sent anywhere in the world where a soldier can be sent. He may be ordered to perform alternate civilian work any place in the world. Assume now that the conscientious objector is ordered to do civilian work in lieu of induction in Japan or Korea. Then, extending the reasoning of the Court of Appeals for the Third Circuit, the only federal court in the United States or its possessions that would have jurisdiction to prosecute, in the event he refused to report for and perform the civilian work, would be the district where he was found—which in the *Johnston* and *Sokol* cases is the Western District of Pennsylvania. Certainly the authors of the Constitution did not intend the recrudescence that a logical extension of the doctrine manufactured by the Third Circuit makes.

The Court of Appeals for the Third Circuit failed to grasp the clear distinction between the different offenses that may be committed under the Universal Military Training and Service Act. It ignored the fundamental proposition that the Selective Service process is a connected series of different steps, the violation of any one of which constitutes a separate offense.—*Falbo* v. *United States*, 320 U. S. 549,

553, 554 (1944); *Billings* v. *Truesdell*, 321 U. S. 542, 553, 554, 556, 558 (1944).

The court entirely overlooked the fact under the regulations and in the records in the *Johnston* and *Sokol* cases (No. 643) that the selectees complied with one step. They reported at their local boards as commanded. They were then ordered to take the next step. This was to start traveling from the local boards in the Western District of Pennsylvania to the hospitals in the Eastern District of Pennsylvania. Johnston and Sokol refused to move out of the district. No compliance with the orders of the local boards was made by them. They refused then and there at the local boards to go farther.

It was the balking of Johnston and Sokol in the Western District that constituted the offenses. The refusal to take the next, different but integrated, step in the selective process took place in the Western District of Pennsylvania. The Court of Appeals for the Third Circuit ignored completely the fundamental proposition that such refusal to take the step could not and did not extend outside the Western District of Pennsylvania. The court in *United States* v. *Johnston*, 227 F. 2d 745, in considering the connected series of steps overlooked completely the vital link in the process: traveling from the local boards in the Western District of Pennsylvania to the hospitals in the Eastern District of Pennsylvania. This could not and would not be completed unless and until the selectees traveled to the hospitals and accepted the assignments. The Court of Appeals for the Third Circuit overlooked the next link, which followed the issuance of the order, in the selective process and stared down the stairway of connected steps seeing only the bottom step, at the hospitals. Instead of coming down the stairway step by step, it took one long leap from the top step to the bottom and missed the step the refusal of which to take constituted the offense.

Section 1660.1 of the Selective Service Regulations (32 C. F. R. § 1660.1) defines the appropriate civilian work

that may be done by a conscientious objector. 32 C. F. R. § 1660.20 (a) provides for the conscientious objector to submit three types of civilian work to the local board, from which it is to determine one that is appropriate. 32 C. F. R. § 1660.20 (b) provides for the local board to submit three types of civilian work to the registrant in the event the registrant fails to submit three types of work that he offers to perform, or if the local board is not satisfied with the three types of work he submits to it. C. F. R. § 1660.20 (c) provides for a hearing before the board attended by a representative of the state director and the registrant, for the purpose of reaching an agreement in the event the registrant and the board have not theretofore agreed upon the type of work to be done. 32 C. F. R. § 1660.20 (d) provides for the local board, upon approval of the Director of Selective Service, to order the registrant to perform civilian work.

32 C. F. R. § 1660.21 (a) provides that no registrant shall be ordered to perform civilian work "in the community in which he resides" unless the local board finds it is "desirable in the national interest."

32 C. F. R. § 1660.30 provides as follows:

> *"Failure or Neglect to Obey Order to Perform Civilian Work.*—Any registrant who knowingly fails or neglects to obey an order from his local board to perform civilian work contributing to the maintenance of the national health, safety, or interest in lieu of induction shall be deemed to have knowingly failed or neglected to perform a duty required of him under title I of the Universal Military Training and Service Act, as amended. When any registrant fails or neglects to obey any such order, his Cover Sheet (SSS Form No. 101) and contents shall be forwarded to the Director of Selective Service for a determination as to whether or not the registrant shall

be reported to the Department of Justice for prosecution."

The significance of the difference between failing to report for work at the place assigned and reporting there and thereafter refusing to perform the work is emphasized in 32 C. F. R. § 1660.31 (a). If a registrant is ordered to do work at a hospital but refuses to report for work, then his local board file remains under the jurisdiction of the local board and the state director of the state where the local board is located. Should the conscientious objector report at the hospital to perform the work, then the file is transferred to the state director of the state where the place of performance of the civilian work is located.

Had petitioners Johnston and Sokol resided, and the boards been located, in a state other than Pennsylvania, then the files would never have been under the jurisdiction of the Pennsylvania State Director. The reason the State Director of Pennsylvania had jurisdiction of the files was that petitioners resided in the State of Pennsylvania and the boards were located there. The State Director of Pennsylvania did not get jurisdiction of the files by reason of petitioners' reporting at the state hospitals to do the work.

In the case of Patteson the local board file was never transferred from the State Director of Oklahoma to the State Director of Kansas. This failure to act was because Patteson never left Oklahoma City and checked in at the state hospital at Topeka. Failure to transfer the draft board file from the Oklahoma Director of Selective Service to the Kansas Director of Selective Service was a distinction in jurisdiction between the local board and the hospital. The failure to make this transfer of the file in the *Patteson* case proves that the hospital in this case never had any jurisdiction over the selectee because he did not report to the hospital and accept the assignment. This distinction, practiced by the Selective Service System, should guide this Court in determining that the hospitals

had no jurisdiction. The district courts in the districts where the hospitals were located likewise had no jurisdiction.

The statute, the regulations and the above-cited cases show that there are separate offenses. There is the offense of failing to report for civilian work. This offense is committed even though the registrant appears at the local board and states his determination not to perform the civilian work. There is the additional and separate offense of refusing to perform civilian work after having reported for such work at the place where it was ordered to be performed. Where the registrant fails to proceed to the place of performance of such work he has committed an offense of failing to report for such work. The offense is obviously committed in the district where his local board is located, and where he refuses to go farther.

The other offense is committed at the place where the civilian work is ordered to be performed. This is committed where the registrant reports for work but thereafter refuses to perform the work. This offense is committed in the district where the place of work is located.

The two offenses are distinct and separate. The federal district court where the board is located has no jurisdiction over the offense of refusing to perform civilian work where the registrant has reported at the place of work and refused to do the work, as in the case of the defendant in *Gibson* v. *United States*, 329 U. S. 338 (1946). The district court where the place of work is located has no jurisdiction over the offense where a registrant reported to the local board or did not proceed to the place of work, as in the cases of *Dodez* v. *United States*, 329 U. S. 338 (1946), and *Jeffries* v. *United States*, 10th Cir., 169 F. 2d 86 (1947).

In *Dodez* v. *United States*, 329 U. S. 338 (1946), the registrant was ordered to go to a civilian public service camp at Medaryville, Indiana. His local board was located in Ohio. He wrote the local board stating he would not

report as ordered. He failed to report. He was prosecuted in the Northern District of Ohio, and not in Indiana.

In *Gibson* v. *United States*, 329 U. S. 338 (1946), the registrant was ordered to report to a civilian public service camp in South Dakota. He registered with a local board at Eldorado, Arkansas. After reporting at the camp in South Dakota he departed without leave. He was indicted and prosecuted in the District of South Dakota.

In *Jeffries* v. *United States*, 10th Cir., 169 F. 2d 86 (1947), it was held that, when a registrant reported at his local board and stated his refusal to proceed to a civilian public service camp to perform work of national importance, the registrant committed the offense of failing to report to his board to do work of national importance. In that case the defendant registered with his local board in Scott City, Kansas. He was thereafter ordered by the local board to report for work of national importance and proceed to the civilian public service camp at Lapine, Oregon. The defendant was indicted, prosecuted and convicted in the District of Kansas. His conviction was affirmed by the Court of Appeals, which constituted an implied finding that the District of Kansas had jurisdiction of the offense.

If each selectee in these cases had been ordered to report for induction into the armed forces and refused to report for induction there would be no doubt that jurisdiction would be fixed in the district courts where the local boards are located. Had Johnston and Sokol been ordered to report for induction in Philadelphia and reported at such induction center and then refused to submit to induction, there would be no doubt that the United States District Court for the Eastern District of Pennsylvania would have jurisdiction. Had petitioners Johnston and Sokol been ordered under the 1940 Act (50 U. S. C. App. §§ 301-318) to report to their local boards and to do work of national importance in a civilian public service camp in the Eastern District of Pennsylvania, and thereafter failed to proceed to such civilian public service camp, there would be no

doubt that jurisdiction would be in the United States District Court for the Western District of Pennsylvania. (*Dodez* v. *United States*, 329 U. S. 338 (1946)). But assume that Johnston and Sokol had proceeded to the civilian public service camp in the Eastern District of Pennsylvania, and there refused to perform the work, and were indicted therefor, then there would be no doubt that the Eastern District of Pennsylvania would have jurisdiction.—*Gibson* v. *United States*, 329 U. S. 338 (1946).

The Government attempts to distinguish *Dodez* v. *United States*, 329 U. S. 338 (1946). It is said that the difference makes the distinction. The Selective Training and Service Act of 1940 (50 U. S. C. App. §§ 301-318), it is said, provided for travel pay which was picked up at the local board under the regulations promulgated pursuant to the 1940 Act. It is argued that because travel to the hospital under the Universal Military Training and Service Act (50 U. S. C. App. §§ 451-470) is paid by the selectee, such is a distinguishing factor. This is a distinction without a difference. The link in the selective process from the local board to the hospital is not determined according to who pays the travel expense.

In each of these cases the selectees were ordered to report to the local boards and then to proceed from there to the hospitals with the assignment of work. This showed that there were two separate but integrated links in the chain. The link of travel to the local board and the link of travel from the local board to the hospital were different. It is plain that there was the duty to take the two integrated steps irrespective of whether the travel pay was covered by the Government or not. The result in the case of *Dodez* v. *United States*, 329 U. S. 338 (1946), did not pivot on the fact that the Government paid the travel expense. It turned on one link in the chain ending at the local board and the other link beginning at the local board and ending at the civilian public service camp.

The argument of the Government about the travel pay

making the situation between the process under the 1940 Act and present act different is without substance. It borders on the frivolous. Under both acts the offense was committed when the registrant refused to travel from his home or the board to the civilian public service camp or to the hospital, regardless of who pays the travel costs.

There is no difference whatever between the offense of failing to report for civilian work under the Universal Military Training and Service Act and the offense of failing to report for civilian work of national importance under the 1940 Act (50 U. S. C. App. §§ 301-318). The offense is committed under each act by the failure to leave home and report at the place of work and enter upon the performance of such civilian work. The offense of leaving a civilian public service camp under the 1940 Act is the same as the offense of leaving a place of civilian employment under the present Act (50 U. S. C. App. §§ 451, *et seq.*). Under both acts the jurisdiction of the district court is to be determined by the place of the offense, that is, the place where the camp or hospital is located. Under both acts the place of the offense of failing to report for work is in the district where the local board is located. Under both acts the jurisdiction of the offense of leaving civilian work is in the place where such work is ordered to be performed.

Since the district court where the board is located has jurisdiction of the offense of failing to report for induction in the armed forces, when the registrant fails to proceed to the induction center (*Falbo v. United States,* 320 U. S. 549 (1944)), then by force of the same reason, the same court would have jurisdiction over the failure of a registrant classified as a conscientious objector to proceed to the place of work. (*Dodez v. United States,* 329 U. S. 338 (1946)) The offense is identical. It is committed in the same district, namely, the place where the order to report was given and compliance therewith refused by declining to leave the board and go to the place designated.

In the opinion written by Judge Goodrich for the Court

of Appeals in the *Johnston* and *Sokol* cases (227 F. 2d at p. 747), the court likened the refusal to comply with the draft board order to the familiar illustration made in venue cases of shooting across a state line and killing a person in the adjoining state. The court also simulated the refusal to comply with the draft board order to cases of publication of libelous words in more than one jurisdiction, false representation by means of mail delivered in another state, shipment of impure foods from one state to another and a solicitation in one state by a person made to an employee in another state to violate his official duties.

These illustrations relied on by the court in the *Johnston* and *Sokol* cases and claimed to be analogous are not at all analogous. They are obviously distinguishable. The acts were *affirmative* acts. They involved offenses of misfeasance and malfeasance passing from one jurisdiction to another. They did not involve the distinctly different situation here, which is a refusal to act, or nonaction. The case here involves no overt act committed in one district that extends into another.

The analogy drawn by Judge Goodrich turns to the nonaction of Johnston and Sokol in refusing to comply with the draft board orders. (227 F. 2d 748) It is likened to the refusal and failure of a person to file reports and returns in different administrative agencies. The court also likens the nonaction of the registrants to a refusal to comply with an order to appear before a legislative committee. (227 F. 2d 748) All the instances relied on by the court below in these cases are not in point. They involved orders issued by the tribunals located in the district where the prosecutions were brought. But these cases do not involve orders issued by tribunals in the district where the prosecution was brought.

The cases relied on in the opinion of the court in the *Johnston* and *Sokol* cases do not support the conclusion reached. They are also patently distinguishable. The tri-

bunals issuing the orders in these cases were located in a district other than that where the prosecution was brought. It is the source of the authority or the order that determines the place of violation of the law or the place of the offense. Since all the cases relied on in the *Johnston* and *Sokol* cases involved orders issued by a tribunal in the district where the prosecution was brought and not orders issued by a tribunal outside the district, as in these cases, such cases are, upon their face, not in point and do not support, in any sense of the word, the conclusion reached by the court below in these cases.

The only two cases relied on by the court in its opinion (227 F. 2d 748) that are seemingly in point are *State* v. *Peabody*, 25 R. I. 544, 56 A. 1028 (1904), and *State* v. *Yocum*, 182 Ind. 478, 106 N. E. 705 (1914). (See footnote 14.) But these two cases are not in point. They involve the failure to support children contrary to law. It may seem that these two cases are analogous to the refusal to comply with the local board order. But they are distinguishable.

In those cases there was involved the liability to support children, which followed the children wherever they went in the state. It was a transitory obligation. (6 Stanford L. Rev. 709 (1954)) The obligation here is not transitory. The orders were issued in the Western District of Pennsylvania. The refusal to comply with the order issued in the Western District of Pennsylvania is the basis for the offense in each case. The obligation began in the Western District of Pennsylvania and the order was breached in the Western District of Pennsylvania and not in the Eastern District of Pennsylvania. But assuming that the *Peabody* and *Yocum* cases are in point, then these two cases relied upon by the court below in its opinion are challenged as being erroneous.

Neither the *Peabody* nor the *Yocum* case dealt with the Sixth Amendment. Indeed the courts did not discuss the constitutional right of the defendants to be tried in the district where the offense was committed. The courts

merely dealt with a common law question of venue. The courts did not have to consider the basic question of the lack of jurisdiction resulting from the mandate of the Sixth Amendment, relied upon by the petitioners here. The third circuit, therefore, fatally erred when it relied on the *Peabody* and *Yocum* cases as authority for the conclusion it reached in these cases.

Judge Goodrich said (227 F. 2d 748): "We think what is being prosecuted here is the failure of these defendants to do what the law required them to do." This statement is proper, but the court circumnavigates the next question and leaves a vacuum by concluding that the refusal took place at the hospital. But the refusal in the *Johnston* and *Sokol* cases did not take place at the hospital. The refusal there took place in the Western District of Pennsylvania, where the orders were given. Here Johnston and Sokol refused to comply with the orders in—and only in—the Western District of Pennsylvania. They did not violate any order at the hospital in the Eastern District of Pennsylvania. There was no refusal to obey any order there.

In footnote 13 of its opinion (227 F. 2d 748) the court cites the English case of *Regina* v. *Milner*, 2 Car. & K. 309, 175 Eng. Rep. 128 (1846), which is also cited in *United States* v. *Anderson*, 328 U. S. 699, 705 (footnote 14). The offense there was failure to appear before the district court in Birmingham that had issued the order. This case is analogous to failure to appear before a local board that had issued the order. It is identical with the factual situation here. The failure to appear before a local board to proceed to perform the civilian work, as was held in *Jeffries* v. *United States*, 10th Cir., 169 F. 2d 86 (1947), is the offense committed, and the offense was committed in the cases at bar in the Western District of Pennsylvania and not in the Eastern District of Pennsylvania. The case of *Regina* v. *Milner*, 2 Car. & K. 309, 175 Eng. Rep. 128 (1846) (227 F. 2d 748) also appears in 9 *Halsbury's Laws of England* (2d Ed.) at page 66, fn. o.

The English cases are not authoritative. The English law is not restricted by a constitutional mandate such as that expressed in the United States Constitution, Article III, Section 2, and the Sixth Amendment. There are other objections to the English cases that are made manifest in a more detailed discussion to be found in Connor, "The Constitutional Right to a Trial by a Jury of the Vicinage," 57 Univ. Pa. L. Rev. 197 (1909), and Blume, "The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue," 43 Mich. L. Rev. 59 (1944).

Apparently the court in *Regina* v. *Milner*, *supra*, had the important question of "the convenience of the court, the witnesses, and the person accused" which Stephen emphasized in his works on the criminal law of England. (1 Stephen, *History of the Criminal Law of England* 278 (1883)) Whatever may have been the common law in England it has now been covered extensively by statute which has completely relaxed the common law rule as to venue. (9 *Halsbury's Laws of England* (2d Ed.) 70-71) This statutory view clarifies the law in a manner contended for by Stephen.

> ". . . It is obvious that all courts otherwise competent to try an offence should be competent to try it irrespectively of the place where it was committed, the place of trial being determined by the convenience of the court, the witnesses, and the person accused. Of course, as a general rule, the county where the offence was committed would be the most convenient place for the purpose."—1 Stephen, *History of the Criminal law of England* 278 (1883).

Under this rule stated by Stephen it is manifest that the most convenient place for the purpose of trial in these cases would be only in the district where the local boards are located. The local board is usually located in the same district where the defendant resides.

All of the witnesses in prosecutions of these cases usually come from the district where the local board is located and the defendant resides. The facts and the controversy between the registrant and the local board never occur in the district where the hospital is located. They are better known and more conveniently established by witnesses in the district where the defendant resides and his local board is located. It is plain, therefore, that a rule of convenience would require that the prosecution in these cases be in the districts where the local boards are located and the selectees resided.

The case of *New York Central & H. R. R. Co.* v. *United States*, 2d Cir., 166 F. 267 (1908), cited in footnote 18 (227 F. 2d 748), is likewise not in point. The failure to file a document at a place fixed by statute is the same as failure to report before the local board for the performance of civilian work and not the failure to report at the place where the work is located.

United States v. *Van Den Berg*, 7th Cir., 139 F. 2d 654 (1944), relied upon in footnote 20 (227 F. 2d 748) is not in point. The holding in that case supports the position taken by petitioners here, that jurisdiction is to be determined by the place where the order is given. In that case the local board was located in the Eastern District of Wisconsin, and the defendant was registered in the Eastern District of Wisconsin. There the court held that the Eastern District had jurisdiction and such holding is directly in point. The other cases cited in footnote 20 are the same factually and also do not support the court's conclusion.

But in the same footnote and not cited as authority for the holding by the court below is the case of *United States* v. *Chiarito*, 69 F. Supp. 317 (D. Or. 1946). That case is directly in point here and is more in consonance with justice, fair play and the spirit of the Sixth Amendment. The opinion was written by Judge James Alger Fee, who is now a member of the United States Court of Appeals for the Ninth Circuit.

One cannot help but be persuaded that the reasoning in the *Chiarito* case is basically more sound than the opinion of the court below in these cases. The reasoning of Judge Fee is cogent. This Court should consider what Judge Fee has to say on this question (69 F. Supp. at pages 321-325). This Court should adopt *United States* v. *Patteson*, 10th Cir., — F. 2d — (Jan. 19, 1956), which held the same as *United States* v. *Chiarito*, 69 F. Supp. 317, and set aside the decision in the *Johnston* and *Sokol* cases (No. 643).

The libel cases relied on in *United States* v. *Johnston*, 227 F. 2d 747, 748, are weakened by the *Matter of Dana*, 7 Ben. 1. In that case Judge Blatchford in the United States District Court for the Southern District of New York quashed a warrant issued by a federal commissioner for the arrest of Dana in New York. Charles A. Dana was the editor of the New York *Sun*. He published an article reflecting upon the public conduct of a federal official in Washington, D. C. The newspaper was widely circulated. Copies of the paper were distributed in the District of Columbia. A complaint was filed before a police magistrate of Washington, D. C. Judge Blatchford treated the proceedings as beyond the jurisdiction of the police magistrate because of want of jurisdiction. Judge Cooley in his treatise, *Constitutional Limitations*, Vol. 1 (Boston, Little, Brown and Co., 1927) (8th Ed.), said as follows (page 677):

> ". . . Matter of Dana, 7 Ben. 1. It would have been a singular result of a revolution where one of the grievances compained of was the assertion of a right to send parties abroad for trial, if it should have been found that an editor might be seized anywhere in the Union and transported by a Federal officer to every territory into which his paper might find its way, to be tried in each in succession for offenses which consisted in a single act not actually done in any of them."

In the *Patteson* case (No. 704) the Government takes the position that he has been charged with the offense of failing to report at the hospital located in Topeka, Kansas, and that such allegation alone is determinative. The indictment so charged him. [RP 1] The motion to dismiss and the supporting affidavit show that Patteson reported to his local board and there refused to go farther, as did Johnston and Sokol. This Court will look through the gossamer allegation and see the true facts and thus avoid a distinction without a difference in these cases.

The Government also takes the position that the Court of Appeals for the Tenth Circuit in the *Patteson* case hinged its decision upon the statement by Patteson to the board that he refused to go farther. This factitious position of the Government ought not to mislead this Court. The decision of the Court of Appeals for the Tenth Circuit was based upon the place where the refusal took place. It is the place of the refusal rather than the place where the statement of refusal is made that is determinative. The making of the statement of refusal by the registrant is mere surplusage. It is evidentiary of the basic fact of refusal. It is the act of refusal and not the statement of refusal to go farther that makes the offense.

The Government takes the position that Section 6 (j) of the Act (50 U. S. C. App. § 456 (j)) emphasizes the *neglect* of the registrant and says nothing about the *refusal* to act constituting an offense. The omission of the word "refusal" in Section 6 (j) of the Act does not at all limit the Act. It does not show an intent on the part of Congress to provide some special venue provision. When Congress omitted to use the words "refuse" or "refusal" it did not have in mind venue or jurisdiction of the offense. Section 6 (j) of the Act is merely declaratory. It is a statement that conscientious objectors who violate the law are equally as guilty as other registrants who refuse to comply with local board orders. Section 12 (a) of the Act (50 U. S. C. App. § 462 (a)) is determinative. This part of the Act

authorizes prosecutions of all persons who "fail or neglect or refuse to perform any duty" under the Act at the place where the refusal took place.

The registrants in these cases did not neglect to report but they refused to report. The indictment in the *Patteson* case charged that Patteson "did knowingly and willfully refuse, neglect and fail to report at the Topeka State Hospital." [RP 1] The indictments in the *Johnston* and *Sokol* cases charged that they did "knowingly neglect to perform a duty" imposed upon them. [RJ 3, 4]

The Court should not permit the Government to confuse the issue by omitting the word "refuse" and emphasizing the word "neglect," both of which are used in the Act. Whether the registrant refused, neglected or failed to perform the duty is not determinative. The important thing is: Where did the omission take place, whether there is a refusal or a neglect?

To determine where the omission occurred it is necessary for the Court to keep in mind the connected links in the chain of the selective process. It is the failure or refusal to take the next step in the process that constitutes the offense. Whether the selectees in these cases "refused" or "neglected" to perform a duty under the Act is not crucial. It is where did such omission take place. The failure to act took place where the next step required to be taken began.

In all of these cases the next step began at the local board and in the district where the local board was located and ended at the hospital. This step was not taken by any of the selectees in these three cases. It is obvious that the offense, therefore, in each case occurred where the nonaction took place. In each of these cases the nonaction took place when the selectee neglected, failed or refused to take the next step required of him under the Act. This was, of course, in the district where the local board was located.

The Government argues that, unless the selectee reports

at the hospital, he does not exhaust his administrative remedies. It relies upon *United States* v. *Sutter*, S. D. Cal., 127 F. Supp. 109 (1954). This is a false position. The holding in the *Sutter* case, *supra*, is erroneous. It ignores and defies *Dodez* v. *United States*, 329 U. S. 338 (1946).

There is no act or process at the hospital that would result in any relief to the registrant. At the hospital there are no physical examinations. The hospitals do not perform any function in the selective process. Prior to the issuance of the order to report for civilian work at the hospital the registrant has already had an armed forces physical examination. This final examination determined once and for all his physical and mental acceptability for civilian work. No further examination is required at the hospital as a part of the selective process. Only one examination is given. That is the armed forces physical examination which each of the selectees in these cases had been given long before the order to do civilian work issued. (*United States* v. *Thomas*, E. D. Ill., 124 F. Supp. 411 (1954); see *Operations Bulletin No. 70*, Selective Service System, Washington, D. C., June 19, 1952, Appendix B to this brief, *infra*, pages 45-47.) The position the Government takes on this point about *Falbo* v. *United States*, 320 U. S. 549 (1944), being applicable is contrary to *Dodez* v. *United States*, 329 U. S. 338 (1946).

The question of failure to exhaust administrative remedies, even if it were applicable here, is not determinative of the question here involved. This is a question of jurisdiction: Where did the offense occur? The issue is not: Did the selectee fail to exhaust his administrative remedies? The Court is not here concerned with whether the selectee will have a defense to the indictment. The issue here is not whether the defendant in the trial court may or may not challenge the validity of the draft board order in defense to the indictment. (*Falbo* v. *United States*, 320 U. S. 549 (1944); *Dodez* v. *United States*, 329 U. S. 338 (1946)) The point to be decided is pure and simple: Did

the refusal or willful failure to comply with the draft board order take place in the district where the draft board was located or in the district where the hospital was located?

The specious argument of the Government ought, therefore, to be disregarded. It is unreasonable and unfair and imposes a harsh burden upon the defendants in criminal cases of this kind so as to give jurisdiction to the district court where the offense was not committed. It is not the location of the place of work that counts, any more than the location of the place where a registrant is ordered to submit to induction would be determinative, if he did not report at such place for induction. It is the place where the offense was committed that gives judisdiction to the court. In all cases where the registrant reports to the local board, and then refuses to go any farther, or declines even to report, either to a place where he is ordered to perform civilian work or to a place where he is ordered to submit to induction, the offense is still committed at the place where the local board that issued the order is located.

Article III and the Sixth Amendment to the Constitution require that defendants in criminal cases be tried in the district wherein the crimes were committed. It is submitted that the *locus delicti* of the alleged crimes in the *Johnston* and *Sokol* cases is in the Western District of Pennsylvania and in the *Patteson* case is in the Western District of Oklahoma. The above analysis of the nature of the crime and its constituent elements fully discloses this.

The position that the selectees take here is supported by *United States v. Johnson*, 323 U. S. 273 (1944). In that case the defendant was indicted for violating the Federal Denture Act (18 U. S. C. A. §§ 420 (f)-420 (h)). The information was filed in the District of Delaware and charged the defendant with depositing in the mails at Chicago for delivery in Delaware certain dentures, in violation of the Delaware laws, contrary to the Federal Denture Act. The

information was quashed on the ground that the defendant could be prosecuted only where the dentures were deposited in the mails. The court pointed out that, in the absence of specific venue provisions giving the Government a choice of trial, the place of trial should be fixed to be consistent with "the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."—323 U. S. at page 276.

The Court also pointed out that, where a defendant is prosecuted in a place other than that of his residence or the place of commission of the offense, he would be subjected to "serious hardship of defending prosecutions in places remote from home." The Court said that such practice of allowing the Government to select places of prosecution remote from the place where witnesses are located gives rise to the "temptation to abuses, already referred to, in the administration of criminal justice." (323 U. S. at page 276.) The attention of the Court is directed also to the concurring opinion of Mr. Justice Murphy in that case (323 U. S. at page 279).

Justice Connor, in his article "The Constitutional Right to a Trial by a Jury of the Vicinage," 57 Univ. Pa. L. Rev. 197 (1909), said:

> ". . . It is true that it is held by some Judges, theoretically, that in the absence of express limitations upon the power of the Legislature, the Courts cannot question the validity of its enactments. If this view be correct, the decisions to which reference has been made, and all others of like import are wrong, and the 'trial by jury,' provided for in the Constitutions, both State and National, means only an indictment and trial by such a number of jurors as Congress or State legislation may prescribe, and, by the same canon of interpretation, a verdict of guilty may be ren-

dered by a majority, or for that matter, a third or fourth of the jurors, if the Legislature so provides. This would lead to the conclusion that a jury of the vicinage meant such vicinage as the Legislature may prescribe, even to the extent of the entire State, provided that, in some form the right to demand indictment by a grand jury and trial by a petit jury, is preserved."—Page 213.

". . . Doubtful governmental powers lie dormant until some unexpected emergency arises when, either for the public safety or, to gratify party or factional passions, they are invoked by the enactment of statutes hastily drawn by men guided by fears or interests, rather than by a recognition of well-settled principles of constitutional law. When their enforcement is resisted, appeals are taken to the Courts, which must pass upon them in the light of authoritative decisions and historical truth. The public mind, at such times, is disturbed by existing and it may be transient conditions or appeals to passion rather than reason. If the Judges find it their duty to disappoint the demand for speedy trials, at the expense of the right of the citizen, it is easy to find their reasons to be 'technical,' or obstructive of the will of the people. Our own history is not without its lessons in this respect. In times of party rage and sectional hatred, statutes were proposed, and some enacted, but little less contrary to the spirit, if not the letter, of the Constitution than that of 35th, Henry VIII."—Pages 214-215.

If the Government is given the power it seeks in cases such as these, then there will be an end to many possible defenses that a conscientious objector might have under the law. It is significant that, in cases where a registrant is ordered to report for induction at a place too distant

for his convenience, he may have the order to report for induction changed and transferred to a place nearer and more convenient to him. (32 C. F. R. § 1632.9) This regulation makes it impossible for a registrant who is ordered to report for induction into the armed forces to be mistreated and denied the right of trial in a district court convenient to him. Also the registrant classified as a conscientious objector is entitled to be tried in the district court where the local board is located. He may not be tried in some faraway and inconveniently burdensome place to which he has never traveled and where he is wholly unknown, as also are the facts of his case.

CONCLUSION

This Court should say that the place where the omission occurred or the refusal took place should determine the place of prosecution. The Court should hold that the step in the selective process ordered by the local board to be performed in each of these cases began in the district where the local board was located. It should be held that the neglect or refusal to take the step of proceeding to the state hospital occurred in each case in the district where the local board was located.

A holding ought to be made that the offense in each of these cases was committed in the district where the local board was located and not where the hospital was situated. This suggested holding is commanded by the United States Constitution, Article III, Section 2, and the Sixth Amendment. These constitutional mandates, under the facts and circumstances of these cases, require that this Court hold that the district courts where these prosecutions were instituted, the districts where the hospitals were located, did not have jurisdiction and the district court in each of the three cases committed no error in sustaining the motion to dismiss the indictment.

The Court should, accordingly, reverse *United States* v. *Johnston and Sokol* (No. 643) and affirm *United States* v. *Patteson* (No. 704).

Respectfully submitted,

HAYDEN C. COVINGTON

Attorney for Petitioners Johnston and Sokol and Respondent Patteson

March, 1956.

APPENDIX A

Section 1660.1 of the Regulations

Section 1660.1 of the Selective Service Regulations (32 C. F. R. § 1660.1) (E. O. 10328, 17 F. R. 1650, Feb. 22, 1952) provides:

"*Definition of Appropriate Civilian Work.*—(a) The types of employment which may be considered under the provisions of section 6 (j) of title I of the Universal Military Training and Service Act, as amended, to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O shall be limited to the following:

"(1) Employment by the United States Government, or by a State, Territory, or possession of the United States or by a political subdivision thereof, or by the District of Columbia.

"(2) Employment by a nonprofit organization, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when such activity or program is not principally for the benefit of the members of such organization, association, or corporation, or for increasing the membership thereof.

"(b) Except as provided in subparagraph (2) of paragraph (a) of this section, work in private employment shall not be considered to be appropriate civilian work to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O."

Section 1660.20 of the Regulations

Section 1660.20 of the Selective Service Regulations

(32 C. F. R. § 1660.20) (E. O. 10328, 17 F. R. 1650, Feb. 22, 1952) provides:

"*Determination of Type of Civilian Work to Be Performed and Order by the Local Board to Perform Such Work*—(a) When a registrant in Class I-O is found acceptable for service after his armed forces physical examination or when such a registrant has failed to report for or to submit to armed forces physical examination, he shall, within ten days after notice of acceptability is mailed to him by the local board or within ten days after he has failed to report for or submit to armed forces physical examination, submit to the local board three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1, which he is qualified to do and which he offers to perform in lieu of induction into the armed forces. If the local board deems any one of these types of work to be appropriate, it will order the registrant to perform such work, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

"(b) If the registrant fails to submit to the local board types of work which he offers to perform, or if the local board finds that none of the types of work submitted by the registrant is appropriate, the local board shall submit to the registrant by letter three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate for the registrant to perform in lieu of induction. The registrant, within ten days after such letter is mailed to him by the local board, shall file with the board a statement that he either offers to perform one of the types of work submitted by the board, or that he does not offer to perform any of such types of work. If the registrant offers to perform any one of the three types of

work, he shall be ordered by the local board to perform such work in lieu of induction, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

"(c) If the local board and the registrant are unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the State Director of Selective Service for the State in which the local board is located, or the representative of such State Director, appointed by him for the purpose, shall meet with the local board and the registrant and offer his assistance in reaching an agreement. The local board shall mail to the registrant a notice of the time and place of this meeting at least 10 days before the date of the meeting. If agreement is reached at this meeting, the registrant shall be ordered by the local board to perform work in lieu of induction in accordance with such agreement, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

"(d) If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work."

Section 1660.30 of the Regulations

Section 1660.30 of the Selective Service Regulations (32 C. F. R. § 1660.30) (E. O. 10328, 17 F. R. 1650, Feb. 22, 1952) provides as follows:

"*Failure or Neglect to Obey Order to Perform Civilian Work.*—Any registrant who knowingly fails or neglects to obey an order from his local board to perform civilian work contributing to the maintenance of the national health, safety, or interest in lieu of induction shall be deemed to have knowingly failed or neglected to perform a duty required of him under title I of the Universal Military Training and Service Act, as amended. When any registrant fails or neglects to obey any such order, his Cover Sheet (SSS Form No. 101) and contents shall be forwarded to the Director of Selective Service for a determination as to whether or not the registrant shall be reported to the Department of Justice for prosecution."

Section 1660.31 of the Regulations

Section 1660.31 of the Selective Service Regulations (32 C. F. R. § 1660.31) (E. O. 10328, 17 F. R. 1650, Feb. 22, 1952, except as otherwise noted) provides as follows:

"*Administration of Registrants While Performing Civilian Work.*—(a) After a registrant who has been classified in Class I-O reports in response to an order from his local board for civilian work in lieu of induction and he has been classified in Class I-W, his Cover Sheet (SSS Form No. 101) and contents shall be forwarded to the State Director of Selective Service for the State in which the work is being performed. It shall be the responsibility of such State Director of Selective Service to see that the registrant performs the work to which he has been ordered by the local board for a period of twenty-four consecutive months, unless sooner released under the provision of section 1660.21. When the registrant has satisfactorily completed this work, the State Director of Selective Service shall return the registrant's cover sheet to the local board

together with a letter stating that the registrant has satisfactorily completed his work. If the registrant should fail to perform such work, or should otherwise fail to perform his duties under title I of the Universal Military Training and Service Act, as amended, during the time that his cover sheet is in the custody of the State Director of Selective Service, the State Director of Selective Service shall forward the cover sheet to the Director of Selective Service for a determination as to whether or not the registrant shall be reported to the Department of Justice for prosecution.

"(b) When the civilian work to which a registrant is ordered by the local board in lieu of induction is to be performed at any place outside of the continental limits of the United States, the Territories of Alaska and Hawaii, Puerto Rico, the Virgin Islands, Guam, and the Canal Zone, and the registrant has reported for such work, the local board, after classifying the registrant in Class I-W, shall forward the registrant's Cover Sheet (SSS Form No. 101) and contents to the Director of Selective Service. It shall be the responsibility of the Director of Selective Service to see that the registrant performs the work to which he has been ordered by the local board for a period of twenty-four consecutive months, unless sooner released under the provisions of § 1660.21. When the registrant has satisfactorily completed this work, the Director of Selective Service shall return the registrant's cover sheet to the local board together with a letter stating that the registrant has satisfactorily completed his work. If the registrant should fail to perform such work, or should otherwise fail to perform his duties under title I of the Universal Military Training and Service Act, as amended, during the time that his cover sheet is in the custody of the Director of Selective Service, the Director of Selective Service shall determine whether or not the registrant shall be reported to the Department of Justice for prosecution.

"(c) When the local board receives the cover sheet

of the registrant from the Director of Selective Service or the State Director of Selective Service together with the letter stating that the registrant has satisfactorily completed his period of civilian work or a written notification that the registrant has been sooner released from such work by the Director of Selective Service under the provisions of § 1660.21, the local board shall mail the registrant a certificate evidencing his satisfactory completion of and release from civilian work and shall retain him in Class I-W and identify him on all records by following his classification with the abbreviation 'Rel.' until such time as he attains an age beyond the maximum age of liability for military service."

[Paragraph (c) amended by E. O. 10420, 17 F. R. 11593, Dec. 19, 1952]

APPENDIX B

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
1712 G Street Northwest
Washington 25, D.C.

[SEAL]

In Replying Address
The Director of Selective
Service
And Refer to No.
June 19, 1952

OPERATIONS BULLETIN NO. 70
SUBJECT:

ARMED FORCES PHYSICAL EXAMINATIONS FOR CLASS I-O REGISTRANTS

1. The Department of the Army has issued the attached letter dated June 2, 1952, which prescribes the procedures to be followed at the Armed Forces Examining Stations for

the mental and physical examination of Class I-O registrants and which is supplemental to Special Regulations No. 615-180-1, dated November 5, 1951, as amended.

2. The examination of Class I-O registrants will be initiated in July 1952. These registrants shall be forwarded for armed forces physical examination beginning in July 1952 in accordance with arrangements which shall be made by State Directors of Selective Service with Army Commanders or their designated representatives. Since the number of Class I-O registrants who may be ordered to perform civilian work in lieu of induction is entirely dependent upon the number of available jobs to which these registrants may be ordered, no useful purpose will be served by having a large number of them examined unless work will be available for them in the immediate future.

3. Local boards shall, so far as is practicable, select and order to report for armed forces physical examination first such Class I-O registrants who are volunteers in the sequence in which they have volunteered for civilian work contributing to the maintenance of the national health, safety, or interest and then such Class I-O registrants who are nonvolunteers in the order of their liability for service.

4. In ordering Class I-O registrants for examination, local boards shall use the Order to Report for Armed Forces Physical Examination (SSS Form No. 223) (Revised 3-18-52). None of the previous printings of SSS Form No. 223 shall be used in ordering any such registrant for examination.

5. Class I-O registrants who are forwarded to the Armed Forces Examining Stations shall be listed on a separate Physical Examination List (SSS Form No. 225).

2.

6. In forwarding Class I-O registrants for examination, all forms prepared at the local board and accompanying documents concerning such registrants which are required to be forwarded to the Armed Forces Examining Station, including the Physical Examination List (SSS

Form No. 225), shall be identified by a stamped notation "I-O" in red ink at the upper right hand corner.

7. The processing of Class I-O registrants for armed forces physical examination will be identical with that of other registrants. State Directors shall keep a separate record of the number of Class I-O registrants forwarded for examination, the number of these registrants examined and found acceptable, the number found unacceptable, and the number who fail to report. This Headquarters will request these data when required.

8. It is not necessary that Class I-O registrants be re-examined in the event they are not ordered to work within the 120 days following completion of their first mental and physical examination. However, the local board may order a Class I-O registrant for re-examination if more than 120 days have elapsed since he was examined and found acceptable for service and the local board has reason to believe that he may no longer be acceptable.

9. The armed forces physical examination is given to Class I-O registrants for the purpose of determining their acceptability for service. If found acceptable, they will be available, in lieu of induction, to be ordered to perform civilian work contributing to the maintenance of the national health, safety, or interest. Any such registrants who fail to report for or submit to the armed forces physical examination shall be available to be ordered to perform civilian work in the same manner as if they had been examined and found acceptable.

LEWIS B. HERSHEY,
DIRECTOR

Attachment

Supreme Court, U. S.
APR 30 1956
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1955

No. 643

PAUL DEEMER JOHNSTON AND JOHN SOKOL,
Petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 704

UNITED STATES OF AMERICA, Petitioner

v.

DUDLEY A. PATTESON

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT REPLY BRIEF FOR PETITIONERS JOHNSTON AND SOKOL AND RESPONDENT PATTESON

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioners Johnston and Sokol and Respondent Patteson

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MAY IT PLEASE THE COURT:

The major points made by the Government in its brief will be dealt with according to subject first and then the minor points will next be taken up in the order in which they turn up in the brief.

I.

The basic thread used by the Government to weave its cloak of argument for a ruling in its favor is defective. The argument that is no good, on which the whole case of the Government rests, is merely an act of cutting out of the Selective Service process the vital and crucial order of the local board that was defied in these cases. (See the brief of the Government at pages 12, 14-15, 17-19, 20-24, 25, 31, 36 and 39.) Locating this faulty yarn in the fabric and pulling it out to its full length unravels the entire garment and leaves the final submission of the Government uncovered by respectable raiment. The final written order mailed to each registrant contained two orders. Read the commands of the order printed by the Government as the appendix to its brief at page 56. The first fiat of the order required that the registrants report to the local board. This the registrants did. The second command in the order was that they "proceed" from the board to the hospital, after receiving travel and work instructions. The registrants refused to do this.

The offense in each of these cases was committed when each registrant refused or—let us use the euphemism adopted by the Government—"failed" or "neglected" to take the next step commanded by the local board of proceeding from the board to the hospital. This refusal to step forward or proceed farther occurred in the district where the local boards were located, which is where each registrant balked. This unauthorized emasculation of the different and separate steps in the Selective Service process so as to transfer the offense, as a magician by slight of hand, from the district where the local board is located to the district where the hospital is situated—where no refusal or neglect to step forward and proceed occurred and nothing happened in these cases—produces nothing but confusion in the legal mind.

The extensive rationalization of the Government manufactures a factitious offense in a district foreign to the

real place of offense. This does nothing but compound the confusion created by the expunction of the order to proceed further by the local board from the process. The logistical legerdemain of the Government shows that it has done nothing less than follow the proverbial ostrich who put its head in the sand to avoid danger.

The best way to blow away the smoke of confusion that is in the eyes of the Government is to here make a hypothetical analogy. Let us take some assumed case close to home. Suppose this Court issued an order to one of its employees to go from this courthouse in Washington to the courthouse in Richmond to bring in a record made in a state case where certiorari had been granted. Assume that the employee had a defiant streak in him and said he would not go until he got good and ready. And he never got ready. He refused to go. This would be contempt, wouldn't it? Well, where would that hypothetical offense occur? In Washington or Richmond? What court would have jurisdiction of the contempt proceedings? In what place would venue lie for the offense: Washington or Richmond? The mere asking of these questions proves the answer: Washington! The same situation prevails in these cases. The local board, like this Court over its employees, has control at all times over the registrant while the hospital job of civilian work is being done. This does not change the venue of the crime based on the refusal to proceed to do the work. If anything, it strengthens the point that the offense occurs where the order was given, which is the place where the refusal to proceed to carry out the job took place. In these cases it is in the district where the local boards were located.

The registrants agree with the Government that not "until that fixed duty is breached does a violation occur." (See brief at page 14.) But the duty fixed by the act is "to perform any duty required of him under . . . directions made pursuant to" the act. (Section 12 (a), 50 U. S. C. App. § 462 (a)) Section 1660.30 of the Selective Service Regu-

lations, 32 C. F. R. § 1660.30, provides that failure or neglect "to obey an order from his local board" to do civilian work is a violation of the act.

The emphasis in the act and regulation is placed on the order of the local board. Without a local board, an order and a refusal or a failure to comply with the order there cannot be an offense. The important question to consider is: Where is the local board located and in what district did it issue the order? In what district were the directions to travel given? The next one is: Where did the refusal to obey them or the failure to take the step ordered by the board take place?

In determining where the failure or refusal to act took place, it is important to consider where the orders were given and where the step first required to be taken must begin or take place. In these cases there is no question that the order to proceed from the local board to the hospital was given in the district where the local board is located and, if complied with, the starting of the trip would have taken place in the district where the local board is located. The failure or refusal to take the further step or proceed on likewise took place in that same district.

The Government admits that the link in the chain, traveling or proceeding from the board to the hospital, is required by an order of the board. (See page 32 of the brief.) It does not deny that only by traveling or proceeding can the registrant get to the hospital. But it is said in the case of the conscientious objector that the necessary travel is unimportant. (See page 32-33 of the brief.) The admitted necessity to take the step is declared to be wholly irrelevant and immaterial to the process in conscientious objector cases. It is said (brief, p. 32) that the link of travel in the conscientious objector process to get him to the hospital has absolutely nothing to do with the case because: Why, he has discretion as to the time of his departure! Doesn't he pay his own way? Can't he choose his own means of travel? So says the Government.

So what! What has this got to do with the link in the chain? The registrant still has ahead of him the vital link of "proceeding" from the board in the process. This must be traversed before he gets to the hospital. Unless and until he gets to the hospital he cannot accept employment. If he does not get to the hospital he cannot refuse work the hospital has picked out for him. His selected employer can give him no orders until he comes to the place of employment and he sees and talks to the designated employer. It is manifest, therefore, that proceeding or traveling is a material, necessary and irremovable link in the chain of Selective Service proceedings to get the registrant, who is classified as a conscientious objector, to the hospital.

That the registrant can take off from his home late by airplane on the very day he is to report and get to the hospital on time, or that he can go slow, taking it easy on a burro after leaving days before he is to report and still get there on time, or that he pays for his means of transportation—none of these changes reality to the fiction produced by the Government. He has to travel somehow to get to the hospital, doesn't he? He must proceed some way and leave sometime to get to the hospital on time when ordered by the board. Since this is so, isn't his travel or proceeding a necessary link in the chain? How can it be said that it is not and has nothing to do with the case?

The Government says, however, that the link in the chain of proceeding or traveling by the selectee classified for induction into the armed forces is vital and a necessary link. (See the brief at pages 33-34.) It is also admitted, under the Selective Training and Service Act of 1940, that the travel of the conscientious objector was a vital link. (Br. pp. 35-36) The Government concedes that a failure to take such steps by the selectee to get traveling from the local board to the induction station is an offense committed in the district where the local board is located. A conscientious objector who refuses to proceed from the board to the civilian public service camp under the 1940 Act is con-

fessed to have violated the law in the district where the local board is located.

The specious basis for the Government not making such a concession for the conscientious objector under the present act, however, is that he is not "delivered." (See the brief at pages 28-29.) The term "delivered" is not mysterious. By it is meant he was given a bus or railroad ticket by the local board, in addition to his travel instructions, as do the present selectees and did the conscientious objectors under the 1940 Act. This difference, lack of delivery of tickets to the registrants classed as conscientious objectors, is entirely immaterial. It does not change the reality that all registrants at all times and in all classes must proceed or travel the link in the process, the distance it takes to get to the induction station, to the civilian public service camp or to the hospital under the present act regardless of how he gets his ticket. Whether he pays for it or the Government buys it is immaterial.

The simulated distinction made by the Government is a mere distinction without a difference. It strives in vain to remove the link and produce a vacuum. But it fails. Since it is "failure" or "neglect" or "refusal" to take the step required or traverse the link that makes the offense, and inasmuch as such omission occurred in the district where the local board is located, it must be held that the offense was committed where the local board is located and not in the district where the hospital is situated. Because of the foregoing the registrants are happy to agree with the Government on the main point, which is that "the district in which the hospital is located has no connection at all with the crime with which they have been charged." —See the brief at page 49.

II.

The sophistry of the Government has caused it to be caught off base and it should be put out of the running. The reason is because it says that any "refusal" has nothing

to do with the offenses committed here. (See the brief at pages 2, 7, 9, 10, 12, 14, 15, 42-46.) In all three cases the records show that each registrant appeared at his local board and there refused to act. He told the board, either orally or by letter, that he was not "proceeding" as ordered to the hospital. But the Government says that this act of refusal committed by each registrant has nothing to do with the cases. Why? Because the Government blandly conceals that refusal under a blanket of darkness.

It then, in this darkness, spotlights the hospital and brings into light the next step, the prospective work there designated by the local board. It proceeds to build high its castle on sand by saying that by this anticipatory breach of the law the registrants here "neglected" and "failed" to do work at the hospital. Because it relies upon this hypothetical anticipatory breach of the law that never occurs and it also refused to bring into light the actual "refusal" of the registrants to proceed further, made at each local board, the Government then advances the naïve contention that there was no refusal committed in the cases at all. It says, however, that there was a mere neglect or failure to do work at the hospital as a result of the apparition of the anticipatory breach that never occurs at the hospital.

This again is just another instance of ignoring reality by the Government, which is the act of refusal by the registrants at the local boards to proceed to the hospital. This refusal to proceed, which took place in the districts where the local boards were located, is *ab initio* the offense. This is so regardless of whether it is euphemistically stated by the Government that each registrant merely "neglected" or "failed" to show up for the anticipatory breach of the law at the hospital. It seems that this undeniable fact is a flood large enough to wash away the foundation of sand supporting the governmental structure. It causes its castle of argument to collapse.

It is said time and time again in the Government's brief that the registrants are not being prosecuted for their

defiance. The Government winks at this act at the boards and adds that they are only being prosecuted for their subsequent failure to appear at the hospital. This turns the link in the chin around and puts the tail end of the link in the chain where the head of the link is. This reversal of the process so as to spell "failure" instead of "refusal" should not be accepted. This Court should not be deceived by the misnomer of "refusal" as mere "failure" and "neglect." Also be free from the sophistry of anticipatory breach of duty at the hospital stressed by the Government. The Government makes the offense an anticipatory breach of duty, as above shown, by reversing the link in the chain so as to eliminate the proceeding to travel from the board. This is anathema to be avoided. Shun it now.

It is to be noticed that the act, in the sanctions clause, uses the word "refusal" as well as the words "neglect" and "fail." (Section 12 (a), 50 U. S. C. App. § 462 (a)) But the conscientious objector section of the law simply says that one who "fails or neglects to obey any such order" shall be deemed to have "knowingly failed or neglected to perform a duty required of him" under the act. The sanctions clause is broader and prevails over the declaratory conscientious objector clause, which neglects to mention the word "refusal."

It is absolutely unreasonable to say that Congress, by this indirect manner, intended the conscientious objector clause to be a special venue act to cover conscientious objectors in situations like this in these cases. When Section 6 (j) was written, Congress did not have in mind making it a special venue section. Had it so intended, then surely Congress would have been explicit and not left a vacuum to speculate in. Congress did not intend to allow the Government to read between the lines and import into the act all the pages of its proposed legislation that it has asked this Court to put into the section by accepting what it says in its brief in these cases.

The unsoundness of the argument of the Government about "refusal" being out of the law, as far as conscientious objectors are concerned, is manifest. To accept the argument means that Congress did not intend to punish a conscientious objector who "refused" to do his duty but meant to excuse the defier of the law and intended to penalize only those who simply "neglected" or "failed" to perform the acts required by the local board. The mere statement of this consequence of the Government's argument spews it out of the mouth of reason and statutory interpretation. Nothing more need be said about it.

III.

The question presented by the Government on pages 2 and 3 of its brief is too restrictive. It leaves out the element of refusal to perform the civilian work or proceed farther from the local board, which is the only act giving any rise to any offense in these cases. The Government also overlooks entirely the order of the local board to proceed from the local board to the hospital, a link in the process that has been ignored by the Government.

IV.

The Government at the bottom of page 6, emphasizes the statement by the Court of Appeals for the Tenth Circuit that the "refusal" of Patteson occurred when he notified the local board in Oklahoma that he would go no farther. This is a correct statement of the facts that, accompanied with his failure to proceed to the hospital, gave rise to the offense or failure to proceed to the hospital. There is nothing erroneous in this quoted statement made by the Court of Appeals for the Tenth Circuit in the *Patteson* case.

V.

The Government states that the terms of the orders to report for hospital work sent to each of the registrants in these cases are highly significant. (See the footnote at

the bottom of page 8.) The registrants in these cases agree with the Government. The written order to report contains the second order which was defied at the Board. It was to proceed to the hospital. The significance of this order has been entirely submerged by the Government as a part of the process and in discussing the offense alleged in these cases.

VI.

The statement made by the Court of Appeals for the Tenth Circuit in the *Patteson* case about the offense of refusal to proceed to Topeka occurring when "he notified his local board in Oklahoma that he would go no further" is criticized by the Government. (See page 18 of the brief.) This statement in the opinion of the Court is correct when the facts of the *Patteson* case are considered. It is true that the offense occurs when the registrant fails to proceed from his local board to the hospital; yet his stated refusal combined with failure to proceed constitutes the offense.

VII.

While the statement of refusal by a registrant may not fix the *situs* of the crime, as stated at the bottom of page 18 of the Government's brief, this Court should keep in mind that it is the place of the failure and refusal of the registrant to proceed as ordered by the local board that determines where and when the offense was committed. (See the Government's brief at the bottom of page 18.) The venue and jurisdiction of the offense is to be determined by the location of the local board and the terms of the order as to where the registrant is to proceed from. This factor has been entirely overlooked by the Government.

VIII.

At the middle of page 19 of the brief the Government states that after reporting at the local board, the next duty

of the registrant "is to appear at the place of employment at the subsequent time." This statement is only partly true. But it overlooks entirely the specific order of the local board to take the first step or proceed from the place where the local board is located to the place where the hospital is. It is the failure to thus proceed from the board that constitutes the offense. The anticipatory offense, at a subsequent time at the place where the hospital is located, never occurs as suggested by the Government. While the registrant must appear at the hospital, it should be remembered that he must first travel from the place where the board is located before he can get to the hospital. The failure to travel from the board is the omission that constitutes the offense in this case.

IX.

It is stated by the Government on page 20 that the argument of the registrants, that the duty to proceed from the board that was violated constitutes the offense, is an "erroneous premise." The order of the local board entirely supports the position of the registrants. It tells the registrants, after reporting at their boards, that they will be "given instructions to proceed to the place of employment." A reading of the order shows that the first order of the local board is to report to the local board. The final part of the order explicitly states the offenses that are involved in failure to comply with the regulations. The order, among other things, reads "failure to report at the hour and on the day named in this order, or to proceed to the place of employment pursuant to instructions, or to remain in this employment the specified time will constitute a violation of the Universal Military Training and Service Act, as amended, which is punishable by fine or imprisonment or both."—See the Appendix to the Government's brief on page 56.

This quoted part clearly shows there are a total of three orders given by the local board, two of which are involved

here. The first is to show up at the board at the hour and on the day named. The second is then to "proceed to the place of employment pursuant to instructions" from the local board. The third order requires performance of work after enrolling at the hospital. The order here quoted entirely refutes the contention of the Government about there being no duty breached by the registrant after he reports to the board until he fails to appear at the hospital at the time appointed.

It is to be observed from a reading of this order that there is no time fixed for the registrant to report at the hospital. The time is fixed for him to report at the local board by it in the instructions handed to him, and he then proceeds from there to the place of employment "pursuant to instructions."

X.

The Government, in the subheading of its argument on page 21 of its brief, states that the registrant "has no duty other than to report for employment" after reporting to the local board. This statement, like the entire argument of the Government, overlooks the earlier and separate duty to proceed from the board to the place of employment which is a separate link in the proceedings entirely overlooked by the Government.

XI.

The part of the order quoted on page 23 of the Government's brief shows the responsibility to proceed to the hospital after reporting to the board as the second link in the proceedings. The Government overlooks the order of the board to the registrant commanding him to proceed to the place of work. The Government, on this page, merely states that "he is given more detailed instructions explaining the precise time and person to whom he must report at the place of employment."

This statement of the Government overlooks the step or link in the process following such instruction, which is to travel from the board area to the place of employment. This step begins at the place where the board is located and not at the place where the employment is to be performed.

XII.

At the top of page 24 of the Government's brief, it is emphasized that the travel of the conscientious objector under the regulations from the local board to the hospital is not supervised by some Selective Service official that "entrains such registrant." It is said that how he gets to the place of designated employment is a matter of his own choosing. This is quite true, but it does not in any sense of the word affect or alter the nature of the earlier step in the process not taken by the registrants in these cases. The prior link in the process defied is proceeding from the board to the hospital, which defiance or failure occurred in the district where the local board was located and not where the hospital was situated. The statement by the Government on page 24 that the next duty owed by the registrant is "to appear physically at the place of employment at the appointed time" entirely skips and overlooks the process of proceeding from the board to the place of employment. Without such link or step in the process he cannot appear at the place of employment.

XIII.

In footnote 6 on page 24 emphasis is placed upon the procedure prescribed for the travel of selectees for induction from the board to the induction station. It is pointed out that one of the selectees is appointed a leader and by such means a group is delivered to the induction station. Whether the travel of a registrant is in a group or is under the leadership of another selectee is entirely irrelevant and immaterial. The travel by a conscientious objec-

tor from his local board to the place of doing the work is the same sort of link in the Selective Service process as is the travel of a selectee from the board to the induction station. There is no distinction and that attempted to be made by the Government is one without a difference.

XIV.

It is said on page 25 of the brief that the registrant does not pass from the jurisdiction of the local board to that of another authority. It is then added that the employer has no official position in the Selective Service System similar to that of a camp director of a C.P.S. camp under the Selective Service Regulations for the operation of such camps pursuant to the Selective Training and Service Act of 1940. This argument, while true, is entirely irrelevant.

Now, as under the 1940 law, the Selective Service Director has control and supervision of the conscientious objector from the time of his being ordered to do alternate work in lieu of induction to the time of finishing such work. The camp director under the 1940 Act was an agent of the National Director under the regulations. While the hospital is not under the supervision of the Selective Service System, the registrant forced by law to accepting employment there is under orders of the Selective Service System at all times while he remains at the hospital. Except for such orders he would not be at the hospital. While there is no passing from the jurisdiction of the local board to another authority, it is immaterial. The Selective Service System now, as under the 1940 Act, has full control and supervision over the action of the registrant classified as a conscientious objector to do alternate civilian work.

XV.

The Government again on page 25, by saying "his next duty under the order is to appear at the place of employment," ignores and overlooks the specific order of the local

board to proceed from the board to the place of employment, a vital link, the refusal of which to take, in these cases, constitutes the offense.

XVI.

On page 28 of the brief, the Government states that it was necessary for the registrant under the 1940 Act, after reporting to the local board, to immediately travel to the CPS camp. It is stated that he was thereafter "constructively delivered to the point of departure." So it is under the present regulations. The registrant must report at the local board on a day and at an hour specified and thereafter he is constructively delivered to the hospital by oral orders and written instructions to proceed forthwith to the hospital.

XVII.

The Government argues that under the 1940 Act a registrant was no longer under the jurisdiction of his local board after he started traveling to the camp. It is correctly stated that then it was he became subject to the exclusive directions of the Director of Selective Service rather than the local board. (32 C. F. R. § 652.13) But this difference is entirely irrelevant. Under the 1940 Act a registrant who appeared at the local board and refused to start traveling pursuant to the orders of the board was still subject to the jurisdiction of the local board. Since in these cases the registrants did just that, there is no materiality in the argument of the Government on page 29, about the jurisdiction of the local board under the 1940 Act ceasing after the registrant began to travel. This argument of the Government boomerangs against it. It shows that under the 1940 Act the jurisdiction of the local board ended at the time the travel began, whereas under the present act the jurisdiction of the local board does not end even after the registrant gets to the hospital and begins working.

XVIII.

In footnote 9 appearing at the bottom of page 29 the practice about conscientious objectors traveling individually under the 1940 Act and being met by the Government truck from the camp is submitted as a relevant factor. This method of travel and procedure under the 1940 Act has no relevance to the question involved in these cases.

XIX.

In the footnote on pages 30-31 of the Government's brief irrelevant talk is made about the failure of a registrant to exhaust his administrative remedies. *Falbo* v. *United States*, 320 U. S. 549, is cited, but there is no failure to exhaust administrative remedies involved in these cases. (See *Dodez* v. *United States*, 329 U. S. 338.) This Court is not concerned with whether the registrants exhausted their administrative remedies. Here the only question involved is where did the offense occur. The suggestion made at the bottom of pages 30-31 in the footnote is entirely irrelevant.

XX.

It is said on page 32 of the brief that the second duty of the registrant after reporting to the local board is to "then report at the place of employment" for assigned duties. It is then added that because the written order does not deal with the time they are to depart and the mode of travel the order "cannot be the basis of a further duty to proceed on the trip to the place of employment, breach of which would be a separate and distinct crime."

This statement on page 32 of the Government's brief is challenged as being absolutely contrary to fact and law. The order specifically provides for the link of travel from the board to the hospital. This link is a separate and distinct duty from acceptance of employment after reporting to the place of employment. This argument of the Government does nothing but cut out of the process the vital step,

the refusal to take which in these cases constitutes the offense.

XXI.

The fact that the registrant is allowed discretion as to how he shall travel, whether by fast or slow means, is entirely irrelevant. Regardless of the means employed to travel, the link of travel or proceeding from the board to the hospital is necessarily implied as a connecting link in the Selective Service process that has been omitted by the Government in these cases.

XXII.

At the bottom of page 32 of the brief it is stated that no offense can be committed until the registrant fails to report at the hospital "for work as ordered." This argument of the Government has throughout the brief overlooked the vital link of proceeding from the board to the hospital.

XXIII.

Dodez v. *United States*, 329 U. S. 338, is attempted to be distinguished on pages 33-34 of the brief. It is said that Dodez mailed his letter refusing to report for work to the local board. That Dodez informed the local board in writing of his refusal and the registrants in these three cases notified the board orally and by personal delivery of a letter of refusal is immaterial. The delivery of the letter to the board containing the refusal by Dodez constituted his constructive reporting; for all practical purposes, the facts in the *Dodez* case are identical to the facts in these cases.

It is suggested at the bottom of page 33 that the *Dodez* case would be in point if these registrants had failed to report to their local board "in compliance with the first Order on the form they received." This is ridiculous because there still would be no difference in the refusal to proceed to the place of the performance of civilian work.

With tongue in cheek the Government again naïvely suggests that, if these registrants had done what Dodez did, fail to show up at the local board, they would not have exhausted their administrative remedies. (See footnote 12 on page 34 of the Government's brief.) This suggestion flies in the teeth of the *Dodez* opinion itself, which contradicts the suggestion of no exhaustion of administrative remedies. Remember that the final armed forces physical examination in these cases, like that in the *Dodez* case, had been completed before the registrants were ordered to do the civilian work.

XXIV.

The attempt to distinguish *Dodez* v. *United States, supra,* from these cases, at the top of page 35, also falls flat. It is stated that the registrants here are not being prosecuted for failure to report to the local board. It is also said that the orders of the local boards in the present cases do not involve an obligation to "submit to delivery to an authority other than that of the local board." Insofar as that difference is concerned, it is insignificant and immaterial. The refusal in either case would be a disobedience to the local board order which was committed in the district where the local board was located.

There is nothing mysterious or distinctive about "submit to delivery" required of conscientious objectors under the 1940 Act. While the conscientious objector was not subject to the local board while performing civilian work in the CPS camps, he was subject to the continuing jurisdiction of the Director of the Selective Service System.

Insofar as "delivery" is relied upon as a distinction, there was nothing to that different from the present delivery of a conscientious objector to a hospital, other than that the registrant was given a bus or railroad ticket providing him with the specific means of travel free of charge to him. The reason the old law provided transportation free of charge while the new law does not is that a conscien-

tious objector received only meager compensation for work in the CPS camps while now he is employed on the standard wage scale paid by the hospital to other employees doing similar work.

XXV.

The Government suggests that there is inconsistency in the argument made by the registrants in their brief. (See the brief for the Government at the top of page 36.) It has never been suggested and is not now argued that the failure to "leave home" is the gravamen of the offense. In these cases the homes of the registrants were located in the places where the local boards were situated. The inadvertent use of the word "home" in the main brief was not intended to imply that the residence of a registrant fixed the place of prosecution. Admittedly this does not. It is the place where the board is located and the place where the order was made, which is where the order was defied, that determines the district where the prosecution should be brought.

XXVI.

At the bottom of page 36 an entirely erroneous statement is made by the Government. It is "failure to leave the local board and continue on the journey" to the hospital is not a definable offense. It is added erroneously that the registrant need not "depart immediately." This may or may not be the case. Usually the board gives the registrants instructions to leave forthwith. On rare occasions they may allow them more time to travel to the hospital. In practically every case there is a command to leave as soon as transportation facilities permit. The statement, therefore, made at the bottom of page 36 and at the top of page 37 is incorrect.

There is, moreover, a very definable offense committed when the registrant fails to leave the place where the local board is located and proceed to travel to the place where

the hospital is located.—See the order of the local board appearing on page 56 of the Government's brief.

It is argued that the discretion on the part of the registrant as to the means of travel eliminates from the case any offense in failure to proceed from the local board because "there is no fixed duty to proceed at any certain time and place." It has been pointed out heretofore in this reply brief that this argument is fallacious. The duty to proceed is explicit in the order and the responsibility to travel from the local board to the hospital is a duty imposed by the act which, if not performed, constitutes an offense.

XXVII.

At the bottom of page 38 of the Government's brief it is stated that the registrants said in their briefs that the statement of refusal to the local board was evidence of "their future intent" and not a criminal act itself. This is not an accurate representation of what was said in the main brief. While the declaration of a refusal to proceed to the hospital is evidence of the crime, it does not constitute the crime itself. There was, moreover, no statement made by the registrants anywhere in their brief that it was a declaration of a "future intent." It was a declaration of a present state of mind in respect to a present order that they would not proceed from the board made by the registrant at the time and place they reported to the local board. The argument of the Government therefore confuses the contention of the registrants made in the main brief and ought, accordingly, to be discarded.

XXVIII.

The statement made at the bottom of page 41 by the Government that the offense in the *Johnston* and *Sokol* cases occurred in the Eastern District of Pennsylvania where the hospital was located and "the crime charged was committed there, if at all" is here challenged as being

an incorrect statement of the law. This statement again overlooks entirely the specific duty on the part of the registrant to travel from the local board to the place of employment.

XXIX.

The statement made by the Government on page 43 of its brief "the omission to act cannot be made to rest solely on expressed or implied statements of refusal" is a correct statement. This Court should, however, bear in mind that the expressed or implied statements of refusal by failing to proceed to the hospital may be considered along with other facts in determining whether the offense has or has not been committed as charged in the indictment.

XXX.

The Government states on page 43 of the brief that the written order to report for civilian work in the second order specified therein, to report at the place of employment, is a command to do "an act at the place of employment." This statement by the Government again overlooks the vital step of proceeding from the board to the hospital.

The interpretation put upon the order by the registrant is supported by the written order itself. In defining the offense committed in failing to report at the hospital the order specifically states that the failure "to proceed to the place of employment pursuant to instructions . . . will constitute a violation of the Universal Military Training and Service Act, as amended, which is punishable by fine or imprisonment or both." This part of the order, which appears on page 56 of the appendix to the Government's brief, shows conclusively that the second order specifically required a duty to "proceed" from the local board to the place of employment.

XXXI.

The Government criticizes the opinion in the *Patteson* case because the Court of Appeals for the Tenth Circuit "does not suggest what the results would have been" had the registrant said nothing and done nothing. The opinion of the Court in the *Patteson* case makes plain that it was his failure to proceed farther regardless of what he said and when he said it, that constituted the offense. The opinion answers the criticism of the Government made at page 44 of its brief.

XXXII.

The Government argues on page 45 that the registrants in their brief make an "awkward attempt to change what is essentially a crime of omission into a crime of commission." While the registrants will not take time to debate whether their brief on this point is "awkward," they do challenge the statement made that they have attempted to change a crime of omission into a crime of commission. At all times throughout the proceedings in these cases the registrants have held that the crime charged is solely that of omission. It has never been suggested, and is not now argued, that the acts of the registrants in refusing to comply with the order of the local board constituted a crime of commission. The argument of the Government is frivolous—pure and simple—and ought to be disregarded as such.

XXXIII.

It is quite easy to answer the hypothetical statement made by the Government in its brief on page 45. The question is asked as to what would happen had the registrant "gone to a third district 'refused' to proceed further." The answer to all these hypothetical cases stated by the Government here and elsewhere in the brief about the registrants' changing their minds before they get to the hospital is plain and simple.

Unless and until the registrant has gone to the hospital and there enrolled and accepted employment, he has defied the order of the local board: not in the district where the hospital is located but only in the district where the local board is. No offense can be committed in any district other than where the local board is located unless and until after the registrant has registered in at the hospital, accepted employment and then undertaken his duties.

Following such acceptance of employment, if the registrant leaves the hospital and quits work, he will then be guilty of an act of commission, namely: leaving the hospital in defiance of the local board's order. This act of commission against the local board's order would occur in the district where the hospital is located.—See *Gibson* v. *United States*, 329 U. S. 338.

XXXIV.

Rumely v. *McCarthy*, 250 U. S. 283; *United States* v. *Lombardo*, 241 U. S. 73; and the other cases cited and quoted from by the Government on pages 46 to 48 of its brief support the position of the registrants in these cases. All these cases relied on by the Government involved a situation where the tribunal gave an order, or else the Congress gave an order, that required the filing of papers or reporting to and performing some act at the place where the office of the administrative agency was located. It has at all times been the position of the registrants in these cases that in such a situation, as is contended for here, the venue and jurisdiction of the offense (committed by failure to comply with the order to file a paper with the administrative agency or appear before the administrative agency) would be committed in the district where the office of the administrative agency where the act was required to be done was located.—See the main brief for the registrants in these cases at pages 26 to 31 where cases similar to those above cited are discussed and distinguished.

XXXV.

The registrants have not argued, and do not here argue, as suggested by the Government at the bottom of page 50 and at the top of page 51, that a defendant in a criminal case has a constitutional right to be prosecuted where he resides or the place where he was when the crime was committed. The registrants agree with the Government that the Constitution guarantees the right to be tried in the district where the crime was committed, irrespective of where the defendant resides or where he was when the crime was committed.

XXXVI.

The entire basis of the Government's argument for illegally transferring the crime from the district where the local board is located to the district where the hospital is situated rests solely upon the appearance of the registrant "before his local board." (See the brief at page 51.) Appearance before the local board and expressing a refusal to go forward has no magic in it like Aladdin's lamp as the Government thinks. It does not magically transfer the place of commission of the crime from the one district to the other. The act of refusal to proceed farther is what constitutes the crime. This omission occurs in the district where the local board is located and where the registrant refused to proceed farther. The specious argument at the bottom of page 51 of the Government's brief ought to be rejected.

CONCLUSION

The judgment of the Court in the *Johnston* and *Sokol* cases should be reversed and the judgment in the *Patteson* case should be affirmed for the reasons stated above and in the main brief for the registrants in these cases.

Respectfully submitted,

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Attorney for Petitioners
Johnston and Sokol
and Respondent Patteson

April, 1956.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

PAUL DENNIS JOHNSTON, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN SOBOL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 643

PAUL DEEMER JOHNSTON, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN SOKOL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

As petitioner states (Pet. 4), the decision in these cases is in direct conflict with that of the Court of Appeals for the Tenth Circuit in *United States* v. *Patteson*, decided January 19, 1956, in which the government is petitioning for a writ of certiorari.

In these cases, each of the defendants was indicted in the United States District Court for the Eastern District of Pennsylvania for knowingly neglecting to perform a duty imposed upon him pursuant to Section 6(j) of the Universal Military Training and Service Act to report for civilian work at a hospital in the Eastern District of Pennsylvania (R. 6-9).[1] Each had been classified I-O by a local draft board in the Western District of Pennsylvania where he resided, and each had, at the time he received the work assignment from his draft board, personally notified the board of his refusal to accept such employment (R. 12-15).

The district court dismissed the indictments for lack of venue (Pet. 25-27). The court of appeals reversed (Pet. 28-29), holding that the offense of failing and neglecting to report for civilian work took place in the district where the work was to be performed (Pet. 19-24). This is contrary to the holding of the Tenth Circuit in *Patteson* that a similar offense occurred in the district where the registrant notified his draft board of his refusal to accept such employment.

In view of the conflict, and for the reasons set forth in the Government's petition in the *Patteson* case, we believe that the issue should be resolved

---

[1] The indictment against Johnston charged that he neglected to perform a duty in that "he failed and refused to obey an order" to report for civilian work (R. 8-9).

by this Court. We therefore do not oppose the grant of certiorari in these cases.

Respectfully submitted,

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FEBRUARY 1956.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 643

PAUL DEEMER JOHNSTON AND JOHN SOKOL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 704

UNITED STATES OF AMERICA, PETITIONER

v.

DUDLEY A. PATTESON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit in No. 643 (No. 643 R. 11–17)[1] is

[1] The symbol "No. 643 R." refers to the printed record in the *Johnson* and *Sokol* cases (No. 643); the symbol "No. 704 R." to the printed record in the *Patteson* case (No. 704).

reported at 227 F. 2d 745, and the opinion of the United States District Court for the Eastern District of Pennsylvania (No. 643 R. 8–9) at 131 F. Supp. 955.

The opinion of the Court of Appeals for the Tenth Circuit in No. 704 (No. 704 R. 10–13) is reported at 228 F. 2d 257, and the opinion of the United States District Court for the District of Kansas (No. 704 R. 6–8) at 132 F. Supp. 67.

JURISDICTION

The judgments of the Court of Appeals for the Third Circuit in No. 643 were entered December 1, 1955 (No. 643 R. 18–19) and petitions for rehearing were denied January 4, 1956 (No. 643 R. 20). A joint petition for a writ of certiorari was filed on January 26, 1956 and was granted March 5, 1956 (No. 643 R. 20). The judgment of the Court of Appeals for the Tenth Circuit in No. 704 was entered January 19, 1956 (No. 704 R. 13). The petition for a writ of certiorari was filed February 17, 1956, and was granted March 5, 1956 (No. 704 R. 14). The jurisdiction of this Court in each case rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether venue of the crime of failing or neglecting to obey an order of a local draft board to a conscientious objector to report for civilian work, pursuant to Section 6 (j) of the Universal Military Training and Service Act, lies in the district where the work was to be performed or in

the district where the registrant told his local board that he would refuse to report.

STATUTE INVOLVED

The pertinent portions of the Universal Military Training and Service Act, 62 Stat. 604, as amended, 65 Stat. 75, provide:

> Section 6 (j) of the Act (50 U. S. C. App. 456 (j)):
>
> * * * Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, * * * if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. * * *
>
> Section 12 (a) of the Act (50 U. S. C. App. 462 (a)):
>
> * * * Any * * * person * * * or who in any manner shall knowingly fail or neg-

> lect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

STATEMENT

Both the government as petitioner in No. 704, and the petitioners Johnston and Sokol in No. 643 based their petitions for writs of certiorari on the conflict between the Tenth and Third Circuits in *United States* v. *Patteson*, 229 F. 2d 257, and *United States* v. *Johnston and Sokol*, 227 F. 2d 745, respectively. Since there is a common issue of law involved in all three cases, we shall treat all three cases together, as has opposing counsel.

The facts in each case may be summarized as follows:

No. 704

An indictment returned in the United States District Court for the District of Kansas charged that respondent Patteson on or about July 26, 1954, in "the District of Kansas and within the jurisdiction of this court," after having been classified 1-O (conscientious objector opposed to noncombatant service) by his local board in Okla-

homa, and after having been mailed an order directing him to report on July 26, 1954, for civilian work contributing to the maintenance of the national health, safety and interest, "did knowingly and willfully refuse, neglect and fail to report at the Topeka State Hospital [in Kansas] at the time and place so designated in said order" (No. 704 R. 1).

The Kansas District Court *sua sponte* ordered the cause transferred under Rule 21 (b), F. R. Crim. P.,[2] to the Western District of Oklahoma, where respondent resided and where his draft board was located (No. 704 R. 2). That court, however, retransferred the cause to the Kansas court on the ground that the jurisdiction of the offense was solely in Kansas (No. 704 R. 3).

Respondent then moved in the Kansas court to dismiss the indictment for lack of venue. He alleged that he resided and that his draft board was located in Oklahoma City, Oklahoma; that he registered under the Universal Military Training and Service Act with his local board there; that he received his Order to Report for Civilian

[2] That rule provides:

"The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

Work (S. S. S. Form No. 153 (See *infra*, pp. 22–23, 56) to perform work at the Topeka State Hospital at Topeka, Kansas; that "he reported at his local [*sic*] in Oklahoma City and personally notified the board that he would refuse to accept such employment at the Topeka State Hospital"; and that he neither reported to the Topeka State Hospital nor left the State of Oklahoma "to report for the assigned work" (No. 704 R. 3–4). Under these circumstances, he argued, "the failure to perform the duty that constitutes the offense occurred in the State of Oklahoma" and "the refusal to report to the hospital was an act that was committed in the Western District of Oklahoma and not in the District of Kansas" (No. 704 R. 4).

The Kansas District Court dismissed the indictment, holding that venue of the crime was in Oklahoma rather than in Kansas (No. 704 R. 6–9). In affirming the judgment of the District Court on appeal by the Government (No. 704 R. 13), the Court of Appeals for the Tenth Circuit held that "the duty required of [respondent] by the order was to proceed to Topeka" and that "his refusal to take this step occurred when he notified his local board in Oklahoma that he would go no further." The court further stated, "had he proceeded to Topeka and then refused to do the assigned work, a separate offense would have been committed" (No. 704 R. 12, 10–13).

The indictment returned against petitioner Johnston in the United States District Court for the Eastern District of Pennsylvania charged that on or about November 30, 1953, at Norristown, Pennsylvania, in the Eastern District of Pennsylvania he "did knowingly neglect to perform a duty imposed upon him by the provision of said Act [the Selective Service Act of 1948 as amended by the Universal Military Training and Service Act] in that he failed and refused to obey an order of Local Board 87, New Castle, Pennsylvania, directing him to report for employment at Norristown State Hospital, Norristown, Pennsylvania, and to remain employed there for twenty-four consecutive months in violation of Title 50, U. S. C. Appx., Sections 456 and 462, as amended" (No. 643 R. 4).

Johnston moved to dismiss the indictment on the grounds that the court was without jurisdiction over him, that "the offense, if any, is cognizable only in the District Court for the Middle [*sic*] District of Pennsylvania"; and that a trial under the indictment would deny him procedural due process (No. 643 R. 5). It was stipulated on the motion that Johnston registered with the local draft board in the Western judicial district of Pennsylvania where he resided, and that he had been classified I-O (No. 643 R. 7). It was also stipulated that he was sent the customary Order

to Report for Civilian Work (S. S. S. Form 153; see *infra*, pp. 22–23, 56) advising him of his assignment to hospital work at the Norristown State Hospital, and ordering him to report at his local board on November 27, 1953, where he would be given instructions as to his employment. In addition the Order stated:

> You are ordered to report for employment pursuant to the instructions of the local board, to remain in employment for twenty-four (24) consecutive months or until such time as you are released or transferred by proper authority.[3]

Johnston appeared before his local board on November 27, 1953, where, according to the stipulation, he was instructed as to his work assignment at the Norristown State Hospital and was told to report there on November 30, 1953 (three days

[3] Although the stipulations filed in both the *Johnston* (No. 643 R. 7), and *Sokol* (No. 643 R. 6) cases refer to the fact that the standard form S. S. S. 153 was sent each of these petitioners, neither stipulation makes it entirely clear that both the order to report to the local board and the order to report for employment pursuant to the instructions of the local board were contained in this form, rather than in instructions given to each petitioner on appearing before his local board in compliance with the first order on the form (see *infra*, pp. 22–23, 56). Since some misapprehension in this respect may have colored the various opinions in these cases and since the terms of the order are highly pertinent to a resolution of the issues of law raised, we have appended to our brief a copy of the standard form sent to petitioner Johnston which was then and is now used to order I–O registrants into work of national importance (see *infra*, p. 56).

after appearing at his local board). (No. 643 R. 7). It was also stipulated that he refused to accept this assigned employment both orally and in a written statement which he submitted to the local board, and thereafter "never physically entered the eastern judicial district of Pennsylvania to report for or to perform the work assigned to him" (No. 643 R 7).

The indictment returned against petitioner Sokol, also in the United States District Court for the Eastern District of Pennsylvania, charged that "on or about April 1, 1954, in the Eastern District of Pennsylvania" he "did knowingly neglect to perform a duty imposed upon him by the provisions of the said Act [the Selective Service Act of 1948, as amended by the Universal Military Training and Service Act] in that he failed to report to the Philadelphia State Hospital, Roosevelt Boulevard and Southhampton Road, Philadelphia, Pennsylvania, for assignment to perform civilian work contributing to the maintenance of the national health, safety or interest, in lieu of induction; in violation of Title 50 Appx. Secs. 456 (j) and 462" (No. 643 R. 3–4).

Sokol attacked the indictment by motion to dismiss on grounds similar to the Johnston motion (No. 643 R. 5). It was stipulated that Sokol registered with his local draft board in the Western judicial district of Pennsylvania where he resided; that he was classified I–O; that he was

sent an Order to Report for Civilian Work (S. S. S. Form 153, see *infra*, pp. 22–23, 56); and that on March 22, 1954, he reported to his local board where he was instructed as to his assignment to the Philadelphia State Hospital.[4] Sokol, like Johnston, "personally refused to accept" his work assignment and "never physically entered the eastern judicial district of Pennsylvania to report for or to perform the work assigned to him" (No. 643 R. 6).

The District Court for the Eastern District of Pennsylvania dismissed both the Johnston and Sokol indictments (No. 643 R. 10). In a memorandum opinion, the court held that although "the duty in each case was to report to the State hospital, the place of performance, in this judicial district, * * * the violation was the defendants' refusal to report to the place of performance" and "the refusal in both cases took place in the Western District of Pennsylvania, and not in this district where defendants were never physically present" (No. 643 R. 9).

On the Government's appeal in both cases, the Court of Appeals for the Third Circuit reversed the judgments and remanded each case to the District Court for the Eastern District of Pennsylvania (No. 643 R. 18–19). In its opinion (No.

[4] The Sokol indictment charges a failure to report to the Philadelphia State Hospital on or about April 1, 1954 (No. 643 R. 3). Sokol thus had ten full days to report to his work assignment after reporting to his local board in compliance with the first order contained on the S. S. S. Form 153.

643 R. 11–17), the Court of Appeals found that the statements made by the petitioners to the local board did not fix the situs of the offenses charged since they (No. 643 R. 13) "are not being prosecuted in the western district for their defiance of the board." "It was in the eastern district where they failed to appear to do the work assigned to them" and "it is this failure which constitutes the offense, if any, in the eastern district."

SUMMARY OF ARGUMENT

I

Each of these three cases involves the prosecution of a 1–O registrant (conscientious objector opposed to both combatant and noncombatant service in the armed services) for failing to report for work of national importance, brought in the judicial district of the place of employment outside the area of the local board that issued the order to report. In the *Patteson* case, the Court of Appeals for the Tenth Circuit sustained the contention that venue of the crime charged could lie only in the district where the local board which issued the order was located. In the *Johnston* and *Sokol* cases, on the other hand, the Court of Appeals for the Third Circuit held that similar indictments were triable where the failure to report occurred, i. e., at the place of employment.

The nature of the duty, the breach of which is the foundation of the charges, can be understood

only against the background of the whole process relating to this type of registrant. These procedures provide that, if the registrant does not himself select appropriate work, the Director of Selective Service assigns him suitable employment. When his name is reached in the process of selection, he is sent an order (S. S. S. Form No. 153, Appendix, *infra*, p. 56) requiring him to do two things: (1) report at the local board for instructions concerning his work assignment, and (2) report for employment at the stated place of employment for 24 consecutive months or until otherwise relieved. Under this order, after reporting to the board to procure his instructions, the next duty required of him is to report to the place of employment.

Since the regulations provide that a conscientious objector will not ordinarily be employed in his own community, it is usually necessary for him to travel to that place. But unlike the procedures which obtained during the period of the public service camp system of World War II, the registrant is not "delivered" to the place of employment, his travel is not usually provided for by the Government, and the time, place, or mode of his leaving is not supervised. How he gets there or when he starts is his own concern—his only duty is to report to the destination at the appointed time. If he fails to report there in compliance with the order, the regulations state that he "shall be deemed to have knowingly failed or neg-

lected to perform a duty required of him under title I of the Universal Military Training and Service Act, as amended." 32 C. F. R. 1660.30. If he does report for his work assignment, he remains subject to the obligations imposed by the local board's order until he has satisfactorily completed the assignment, at which time he is relieved from further duty under it.

The procedures today are to be distinguished from those which obtained under the World War II program. At that time, the local board ordered the registrant to appear before it for immediate delivery *by it* to the public service camp. The Government not only paid for the trip to the camp but arranged the method of transportation and set the time of departure. When the trip commenced, the regulations transferred the registrant from the authority of the local board to that of the camp. Under these circumstances, when the registrant reported to the local board he was under the further obligation to submit to being delivered or entrained to the destination by his local board—an intermediate and significant step not provided for in the current regulations. To the extent, therefore, that any of the cases arising under the World War II program suggest that venue for failure to perform civilian work would lie in the district of the local board, they are distinguishable on their facts. Cf. *Dodez v. United States*, 329 U. S. 338.

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The registrants' attempts to make a failure "to start traveling" the basis of the offense has no justification under present procedures. Today, there is no fixed duty to proceed at any certain time and place, and therefore no point at which a duty to proceed can be said to have been definitely breached. The requirement in the order that the registrant "proceed" is merely a method of complying with the single duty which is fixed by the order and regulations—the duty to report at a certain time and place for work. Not until that fixed duty is breached does a violation occur.

II

Although both the registrants and the Court of Appeals for the Tenth Circuit concur in the assumption that the basis of the crime defined by the statute and charged in these indictments is the "refusal" of the registrant in the area of the local board to proceed to the place of employment, rather than the "failure" to report to the place of employment as ordered, the *Patteson* opinion holds that such "refusal" occurred when the registrant told his local board that he would not comply with the order, while the registrants now claim that the "refusal" is simply to be implied from the fact that they took no action after reporting to the local board. Neither view is correct, since the crime charged is the "failure" rather than the "refusal."

Section 6 (j) of the Universal Military Training and Service Act, which defines the obligations of the 1-O registrant, provides that a registrant ordered to perform civilian work, "who knowingly *fails or neglects* to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [the general penalty provision of the Act], to have knowingly *failed or neglected* to perform a duty required of him under this title". [Emphasis added.] See also, to the same effect: 32 C. F. R. 1660.30. Under the Act and the regulations, these registrants are not being prosecuted for their defiance of the board in the district where the board is located, but for their failure or neglect to report for work in the place of the assigned employment. That is the substance of the crime charged in each of these indictments.

As we have pointed out, the order form sent to the registrant in each case, in addition to requiring him first to report to the local board, also ordered him to report to the place of employment. Contrary to the conclusion of the Tenth Circuit in *Patteson*, the registrant does not violate this latter duty when he notifies his local board orally or in writing that he will not comply. The crime is not complete until the time for reporting at the place of employment has come and gone, and he has not reported there. The criminal law recognizes no anticipatory

breach of an obligation while a possibility remains that the duty may be performed.

The assertion of the registrants that a "refusal" is to be implied from the fact that they did nothing after reporting to the local board is but another attempt to refashion a crime of omission into a crime of commission. They argue that the crime was committed, at some indistinguishable moment, when they did not board a train or otherwise proceed to the place of employment. However, there is no duty imposed on the registrant to commence the journey at any fixed time nor, in the usual case, is the mode of travel regulated in any way. The registrant is required only to report to the place of employment at a stated time. It is therefore the failure to perform the latter duty which is the crime.

Since the criminal penalty attaches to the failure to report to the place of employment, venue is properly laid in the jurisdiction where the employment would have been performed. This is consistent with the general rule that, where an omission to act is the crime, venue lies where the act should have been performed. *Rumely* v. *McCarthy*, 250 U. S. 283; *United States* v. *Lombardo*, 241 U. S. 73; see: *United States* v. *Anderson*, 328 U. S. 699, 705, fn. 14.

III

The registrants' arguments, based on the requirement of the Constitution (Art. III, Sec. 2;

Amendment VI) that crimes must be prosecuted where committed, do not further their case. As we have shown, the crime here was committed at the place of the assigned employment. The Constitution does not require that a prosecution for failure to report to an employer in State X must be prosecuted in State Y where the registrant lives and where his local board happens also to be located. Our conclusion in this respect is supported by the opinion of this Court in *United States* v. *Anderson*, 328 U. S. 699, 704–705, since the offense was committed "where the duty violated would be performed, if performed in full".

The registrants' further argument that a rule of convenience should be applied in these cases to fix the venue where the registrants reside and where their local boards are located cannot change the constitutional requirement. While venue in the state of residence or where the draft board is located might be more convenient for these litigants, that would not necessarily be so in other cases involving failure to report for employment. Moreover, under the Constitution, the issue of venue depends upon the nature of the crime, and here the nature of the crime charged shows that it was committed only in the places where the indictments were brought.

ARGUMENT

The registrants and the Government are in substantial agreement that the resolution of the issue

of venue turns on the nature of the duty, the nonperformance of which is the crime charged. The difference between the parties as to the nature of that duty has been sharpened by the precise position the registrants now take in their brief.[5]

The view of the Court of Appeals for the Tenth Circuit in *Patteson* is that, after reporting pursuant to the Order to Report for Civilian Work, the next duty owed by the registrant "was to proceed to Topeka" and that "his refusal to take this step occurred when he notified his local board in Oklahoma that he would go no further" (No. 704, R. 12). While the registrants concur in the assumption of the *Patteson* opinion that the next duty after reporting to the local board was "to start traveling" from the local board to the work assignment (Reg. Br. 19), they do not claim that the crime was committed when each notified his local board that he would do nothing further. They now advance the theory that the crime consisted in the "failure to leave home" (Reg. Br. 25), and in "balking" in the area of the local board (Reg. Br. 19). They concede (contrary, we think, to the *Patteson* holding on which they otherwise rely) that the situs of the crime was not fixed by "the place where the statement of refusal was made or the letter of defiance was directed to the local board" but "it is the act of refusal

[5] We shall refer to the brief filed on behalf of Johnston, Sokol, and Patteson as the "registrants' brief" or "Reg. Br."

to take the next step that determines the place of the offense and not the subsidiary or evidentiary statement or declaration that determines the issue" (Reg. Br. 12). They also argue that "a registrant may violate the Act by refusing to take the step from the local board forward to the hospital even without declaring his intent either orally or in writing" (*id.*).

Since clarification of the central issue of venue in these cases depends upon the nature of the duty required of the I–O registrant after reporting to his local board, we will first describe the process by which such registrants are ordered into civilian work of national importance. Then, on the basis of this analysis, we will demonstrate that the duty owed by the I–O registrant after so reporting is to appear at the place of employment at a subsequent time, pursuant to instructions given him by his local board. And finally we will show that neither a statement of refusal to the local board nor a refusal implied by the registrant's nonaction in the area of the local board is the gravamen of the offense, but rather that the crime is the failure or neglect to appear at the work assignment as ordered. It is for this reason that the Government has concluded that prosecution may, under the Constitution, properly be laid only in the district where the work is to be performed.

I

THE SOLE DUTY REQUIRED OF EACH REGISTRANT AFTER APPEARING AT HIS LOCAL BOARD WAS "TO REPORT FOR EMPLOYMENT PURSUANT TO THE INSTRUCTIONS OF THE LOCAL BOARD," AND THAT DUTY COULD BE PERFORMED ONLY AT THE PLACE OF EMPLOYMENT

The registrants' entire argument is based on the erroneous premise that, after reporting to the local board pursuant to the first order contained in the Order to Report for Civilian Work (S. S. S. Form 153, *infra*, pp. 22–23, 56), the next duty of each under the Act and regulations was "to proceed" or "start traveling" to the place of employment—rather than "to report for employment pursuant to the instructions of the local board", the second order contained in the Order to Report form. On the further assumption that they can be prosecuted only for the next required step in the sequence of duties required of them as I–O registrants, they conclude that the only prosecution which could be brought against them would be for failure or refusal to leave the geographical area of their local board.

The nature of the duty can be understood only against the background of the whole procedure relating to this type of registrant. And since the registrants seek support for their position in these cases, which arise under the current selective service program, in decisions under the earlier World War II program, without attempt-

ing to point out the significant changes (Reg. Br. 25), we shall at the outset describe those features of both procedures which bear on the issues involved.

A. UNDER CURRENT SELECTIVE SERVICE PROCEDURES THE REGISTRANT, AFTER REPORTING TO HIS LOCAL BOARD, HAS NO DUTY OTHER THAN TO REPORT FOR EMPLOYMENT

1. The current conscientious objector program

Authority for the establishment of a program of civilian work contributing to the maintenance of the national health, safety, or interest, to which registrants opposed to participation in both combatant and noncombatant military service may be assigned by selective service authorities, is found in Section 6 (j) of the Universal Military Training and Service Act, 62 Stat. 604, as amended, 65 Stat. 75, *supra*, p. 3. We deal here only with the process which occurs after a registrant has been classified as such a conscientious objector, class I–O, and has been found physically acceptable for service.

The regulations provide that the registrant shall then submit to the local board three types of civilian work contributing to the maintenance of the national health, safety, or interest (as defined in Regulation 32 C. F. R. 1660.1) which he is qualified to do and which he offers to perform in lieu of induction into the armed forces. If the local board deems any of these types of work to be appropriate it will order the registrant to perform such work (*Ibid.*, 1660.20 (a)). If he

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fails to do this or the submitted list is disapproved, the local board must submit a list of three types of civilian work which it deems appropriate, one of which he may select and be ordered to perform (*Ibid.*, 1660.20 (b)). If the registrant and the local board are unable to agree on suitable employment, the State Director of Selective Service or his representative meets with the registrant and the local board to attempt to reach an agreement (*Ibid.*, 1660.20 (c)). If no agreement is reached, the local board, with the approval of the Director of Selective Service, orders the registrant to report for suitable civilian work (*Ibid.*, 1660.20 (*d*)). The last is the situation in each of the instant cases.

The standard form of the order (S. S. S. Form No. 153), captioned "Order to Report for Civilian Work and Statement of Employer," is sent to the registrant at his mailing address which may or may not be in the vicinity of his residence or his local board (*Ibid.*, 1641.3)). The form contains two orders to the registrant:

> You are ordered to report to the local board named above at ------ m. on the ------ day of ------, 195--, where you will be given instructions to proceed to the place of employment.
>
> You are ordered to report for employment pursuant to the instruction of the local board, to remain in employment for twenty-four (24) consecutive months or until such time as you are released or transferred by proper authority.

The registrant is also informed: "You will be instructed as to your duties at the place of employment" and:

> Failure to report at the hour and on the day named in this order, or to proceed to the place of employment pursuant to instructions, or to remain in this employment the specified time will constitute a violation of the Universal Military Training and Service Act, as amended, which is punishable by fine or imprisonment or both.

When the registrant appears at his local board in compliance with the first of the two orders specified in this form, he is given more detailed instructions explaining the precise time and person to whom he must report at the place of employment. Since no registrant is, except where the national interest demands it, ordered to perform work in the community in which he resides (*Ibid.*, 1660.21), it is usually necessary that he travel to the place of employment. But unlike the World War II system, described *infra*, pp. 27–30, he is not "delivered" to the place of employment by his local board nor does he usually proceed to the place of employment under the aegis of the Selective Service System. Only where it is "necessary" (*i. e.* where the registrant has no personal funds) do the regulations provide travel facilities for him (*Ibid.*, 1660.21 (b)); and as a practical matter no funds have been appropriated to the Selective Service System for this

purpose although every effort is made to supply transportation if absolutely necessary. Usually, no selective service official entrains such registrants, supervises their travel, or meets them at the place of employment. How the registrant gets to his work assignment, after receiving his work instructions, is his own concern. The time given the registrant for reporting varies from case to case. In some cases it may be one or two days, in other cases as long as two weeks or more. In short, after reporting to the local board and receiving instructions as to his work assignment, the next duty owed by the registrant is to appear physically at the place of employment at the appointed time. The method by which he proceeds to that place is not normally supervised by the Selective Service System in any way.[6]

Unlike the situation which obtained under the World War II regulations (see *infra*, 27–30), when the registrant now leaves the local board and

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[6] In contradistinction to this procedure, the registrant who is ordered by his local board to report for induction into the armed forces appears at his local board for that purpose, and is at that time delivered (together with his papers) in a group under the leadership of appointed leaders to the place of induction where the group is met by representatives of the armed forces who are then in charge of him. 32 C. F. R. 1632.14–1632.16. These significant differences refute registrants' contention that there is a precise analogy between "failing to report for induction in the armed forces" and the crimes charged in the instant indictments of failing to report to the place of employment (Reg. Br. 25).

proceeds on his own initiative to the place of employment, he does not thereby pass from the supervision of the local board to another authority, either at the commencement of the trip or at the point of destination. The original order of the local board follows him to his place of employment and is discharged only after he reports to his employer, and then remains in employment for 24 consecutive months unless sooner relieved or unless his employment is changed due to no fault of his own (*Ibid.*, 1660.21 (b)–(d)). The employer is not in the official or supervisory position of a camp director, nor is the place of employment a supervised camp. When the registrant has performed the first duty specified in the order, *i. e.* appearing at the appointed hour before the local board, his next duty under the order is to appear at the place of employment. If the registrant obeys the order and presents himself, the employer notes such fact in the space reserved for that purpose at the bottom of the order to report (see S. S. S. Form No. 153, *infra*, p. 56), and mails the form back to the local board. At that juncture the local board reclassifies the registrant 1–W (conscientious objector performing civilian work, *Ibid.*, 1622.16) and forwards his file to the State Director of Selective Service for the state in which the work is being performed, whose responsibility it is to see that the registrant performs the work specified in the

local board order.[7] When the registrant has satisfactorily completed this work, the State Director of Selective Service then returns the file to the registrant's local board with a letter to this effect (*Ibid.*, 1660.31 (a)). The local board then mails the registrant a certificate evidencing his satisfactory completion of and release from civilian work (*Ibid.*, 1660.31 (c)).

In the event the registrant appears at the local board but does not comply with the second order "to report for employment pursuant to the in-

[7] At one point in their brief, the registrants refer to the fact that Patteson's local board did not transfer his file from Oklahoma to the State Director of Kansas, and conclude from this that "the failure to make this transfer of the file in the *Patteson* case proves that the hospital in this case never had any jurisdiction over the selectee because he did not report to the hospital and accept the assignment" (Reg. Br. 21). This statement evidences a misunderstanding of present procedures. No transfer of "jurisdiction" is involved when the registrant travels to the place of employment, and in any event, the *employer* (who is only that and nothing more) would have no "jurisdiction" over the registrant in any sense of that word. The registrant remains subject to the local board's original order, not only before reporting to the work assignment, but at all times thereafter until finally discharged after satisfactory completion of his assignment 24 months later. While the local board, in a case where a registrant goes to another state to work, will transfer his file to the Selective Service Director for that state for administration, this is done only after a registrant has reported there for his work assignment, the employer has returned his order form with that fact noted by him at the bottom, and the registrant has been reclassified 1-W. (See *supra*, pp. 25-26.) This transfer of the file does not, however, relieve the registrant from his obligation under the original order (S. S. S. Form 153).

structions of the local board", the regulations provide as follows (*Ibid.*, 1660.30):

> *Failure or neglect to obey order to perform civilian work.* Any registrant who knowlingly fails or neglects to obey an order from his local board to perform civilian work contributing to the maintenance of the national health, safety, or interest in lieu of induction shall be deemed to have knowingly failed or neglected to perform a duty required of him under title I of the Universal Military Training and Service Act, as amended. When any registrant fails or neglects to obey any such order, his Cover Sheet (SSS Form No. 101) and contents shall be forwarded to the Director of Selective Service for a determination as to whether or not the registrant shall be reported to the Department of Justice for prosecution.

This regulation follows Section 6 (j) of the Act which authorizes the assignment of conscientious objectors to work of national importance and provides that "any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, *to have knowingly failed or neglected* to perform a duty required of him under this title." [Emphasis added.]

2. The World War II public service camp program

Under the Selective Training and Service Act of 1940, after a class IV–E (equivalent of present

I–O) registrant was found acceptable, the local board notified the Director of Selective Service that the registrant was available for assignment to work of national importance under civilian direction (S. S. Reg. 652.1). The Director made a selection of suitable employment for him (S. S. Reg. 652.2), and sent an Assignment to Work of National Importance (S. S. S. Form 49) to the local board. The local board prepared the Order to Report for Work of National Importance (S. S. S. Form 50)[8] which informed the registrant as to his Civilian Public Service Camp Assignment and ordered him to appear before the board at a specified time.

Unlike the situation today, when the registrant reported to the local board it was "for [immediate] transportation to a camp" (S. S. Reg. 652.12). After a registrant reported to the board, travel documents were prepared for the trip from the board to the camp (S. S. Reg. 652.12) and he was then and there actually or constructively delivered to the point of departure, *viz* (S. S. Reg. 652.12):

* * * * * *

> Except as otherwise provided herein, the local board will follow the same procedure in *delivering* the registrant to work of national importance under civilian direction as is followed in the case of a registrant *delivered* for induction into the land

[8] See R. 155, *Dodez* v. *United States*, No. 86, O. T. 1946.

or naval forces. 7 F. R. 112. [Emphasis added.]

Reporting to the board, in short, was the first stage in the trip to the camp.[9] The duty required of the registrant, after reporting to the board, was to submit to being entrained to the point of destination ("delivered") by selective service officers.

The registrant remained under the authority of his local selective service board only until the journey to the camp had actually begun. At that point he was by regulation transferred to "the jurisdiction of the camp to which he is assigned"[10] and the local board could "take no further steps with regard to such registrant without instructions from the Director of Selective Service" (S. S. Reg. 652.13). As soon as the registrant left on the trip, but not until that time, he became an "assignee" responsible to the disciplining authority of his camp director under special regulations applicable to such persons

[9] As a practical matter, the IV-E registrants were so few in number that they were usually sent individually rather than in a group. When this was done, the camp was notified that the registrant was being delivered at a certain time, and he was usually met at the place of arrival by a government truck from the camp.

[10] While this transfer did not effect a change in "jurisdiction" in a strictly legal sense, "from the time he [became] a camp member the registrant's duties [were] different and his orders came through different channels of the same agency [the Selective Service System]." *Gibson* v. *United States*, 329 U. S. 338, 357.

(S. S. Reg. 653.12, 8 F. R. 4291; S. S. Reg. 691.17, 9 F. R. 4862) and subject to the requirement that "assignees shall report to the camp to which they are assigned" (S. S. Reg. 653.12). Also "at the time the registrant [left] the local board for the camp" the board transferred copies of his Order to Report and the report of his physical examination to the camp director (S. S. Reg. 652.11 (a) (1)), and the board's duties in his case were completed (see S. S. Reg. 653.5).

When the assignee-registrant reported to camp, the camp director indicated that fact in the registrant's Order to Report (S. S. Reg. 653.11 (a)). The assignee was then given a physical examination to determine whether there was any change since his preinduction physical examination, but regardless of its outcome he was accepted in the camp (S. S. Reg. 653.11 (c) (d).[11]

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[11] Comparable procedures were followed in the period 1940–1944. The registrant was physically examined at an induction center (S. S. Reg. 651.2–651.10), was given a camp assignment by the Director of Selective Service (S. S. Reg. 652.2), and was ordered to report by the local board (S. S. Reg. 652.11). On reporting to the local board, he was delivered to the point of departure for the camp and when the journey commenced came "under the jurisdiction of the camp to which he [was] assigned" (S. S. Reg. 652.13). Prior to 1944, however, if the registrant indicated that his physical condition had changed since his final-type physical examination at the induction center he was again examined at the camp, and could be rejected by the camp director if he failed to qualify physically for his assigned work of national importance (S. S. Reg. 653.11). These changes were significant on the issue of when the administrative process was

B. NONCOMPLIANCE WITH THE DUTY TO REPORT FOR EMPLOYMENT OCCURS ON FAILURE TO REPORT TO THE WORK ASSIGNMENT RATHER THAN ON FAILURE "TO START TRAVELING" FROM THE AREA OF THE LOCAL BOARD OR OF THE REGISTRANT'S RESIDENCE

As we have shown, under present procedures, after the 1-O registrant has reported to his local board in compliance with the first order contained in the Order to Report for Civilian Work (*infra*, p. 56), he is not then delivered to Government officers at the point of destination nor does he usually travel at Government expense or under Government direction as to the time and place of departure or the mode of conveyance. After he reports for instructions as to his employment, he is released and no further duty is imposed on him or demand made of him between that time and the time some days hence when, in accordance with the second order of his local board (as contained in the Order to Report for Civilian Work), he is obligated "to report for employment pursuant to the instructions of the local board, to remain in employment for twenty-four (24) consecutive months or until such time as [he is] released or transferred by proper authority."

The contention of the registrants that criminality attaches to the failure of conscientious objectors, at some undefined and indistinguishable moment, to proceed on the journey to the place of

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complete (cf. *Falbo* v. *United States*, 320 U. S. 549, with *Gibson* v. *United States*, 329 U. S. 338), but are not directly relevant to the venue question.

employment is supported neither by the terms of the Order sent the registrants nor by the current law and regulations, and certainly not by any of the cases they cite arising under the World War II program. We repeat that the Order itself commands that they do only two things: report first at the local board for instructions, and then report at the place of employment for their assigned duties. It neither deals with the time they depart or the mode of travel, and therefore cannot be the basis of a further duty to proceed on the trip to the place of employment, the breach of which would be a separate and distinct crime. Of course, in order to report to the place of employment the registrant must somehow get there, but that fact does not create a new and distinct obligation not provided for in the Order. It is merely the necessary means which the registrant must follow to comply with the second requirement set forth in the local board's Order. He is *not* ordered "to start traveling" (Reg. Br. 19), but rather "to report for employment." His time of departure can vary depending on the mode of travel he chooses to use. He may actually leave his district but change his mind in mid-journey. At no point can his failure to perform the duty required of him be fixed until he fails to do the ultimate act required, *i. e.*, to report for work as ordered.

For this reason, the cases arising under and the arguments drawing analogies to the World War II program have no real bearing on the problems of the instant cases. The registrants place heavy reliance on *Dodez* v. *United States*, 329 U. S. 338 (Reg. Br. 9–11, 22–23, 24, 25), involving a prosecution for failure to obey a local board order issued under the Selective Training and Service Act of 1940 which was prosecuted in the judicial district where the local board was located. Although the issue of venue was not involved, the point seems to be that the selection in that case of the judicial district of the local board settles the issue for this case (Reg. Br. 9–10). Dodez, however, was prosecuted and convicted for failure to report for work of national importance "after being ordered to do so." 329 U. S. at p. 340. After receiving the order to report to the local board for what was then the first stage in the trip to and enrollment in a public service camp (see *supra*, pp. 27–30), he wrote a letter to his board stating his unwillingness to comply, and reasserting his claim to minister status. He admittedly failed to report in person to the local board (see R. 14–15, 56–57, *Dodez* v. *United States*, No. 86, O. T. 1946), and that was the basis of the charge against him. The *Dodez* case therefore is more closely comparable to the situation which would have been presented had these registrants failed to report to their local board in com-

pliance with the first Order on the form they received.[12]

Even had Dodez reported to his local board and refused to submit to being "delivered" to the point of departure for the public work camp, he might have been deemed to have failed to comply with the local board's order (as distinguished from the regulations dealing with assignees who had actually commenced their trip to the camp), since reporting to the local board under the World War II system was for the purpose of "transportation to a camp," and this necessarily included the obligation to submit to delivery and entertainment to the camp (the civilian equivalent of being delivered for induction into the armed services). See *supra*, pp. 28–30. This was the situation in *Jeffries* v. *United States*, 169 F. 2d 86 (C. A. 10) (1948), where that defendant was charged with failing, neglecting and refusing to report to his local board at the time and place designated in the order (S. S. Form 50, *supra*, p. 28). While Jeffries put in an appearance at the local board at the appointed time, the Court of Appeals deemed that his failure to submit to its authority "was as much a noncompliance with the order as if he had not appeared at the office of the Local

[12] There would, however, under present procedures, then be a serious question as to whether the registrants had sufficiently completed the administrative process to be able to attack the validity of their classifications. See *Falbo* v. *United States*, 320 U. S. 549.

Board" and likened such nonaction to a failure to submit to induction into the armed services (*Ibid.*, p. 89).

That case has no bearing here since these registrants are not being prosecuted for failing to obey an order to report to the local board, and, in any event, as we have shown, at present the reporting to the local board does not include the obligation to submit to delivery to an authority other than that of the local board.[13] The Order does not now include an obligation to proceed to the place of work assignment under any particular authority; after reporting to the local board,

[13] The registrants erroneously assume that the only point of differentiation between the instant case and *Dodez* and *Jeffries* lies in the fact that previously the Selective Service System assumed the cost of the tr. el of the registrants, but does not now do so (Reg. Br. 24–25). That is one but not the determinative point of distinction. As we have pointed out, even if the *Dodez* case were at all apposite to the issue of venue, at that time the registrant was ordered to appear at the local board, not for instructions as to work assignment, but for transportation and *delivery* to the camp. The transfer was thus not only an essential and supervised step in the process of enrollment in the camp, but, at the point of departure from the area of the local board, changed the status and obligation of the registrant, relieved him from further obligation to the local board (and, reciprocally, the local board from further duties in his behalf), and brought him under the authority of the camp director, and regulations applicable to "assignees." *Supra* pp. 28–30. Today, on the other hand, the original order of the local board which defines his obligations for the work period follows the registrant wherever he goes and is violated wherever and whenever there is a failure to perform the next duty specifically commanded, until the work assignment has been "satisfactorily" performed. *Supra*, pp. 25–26.

the only fixed duty the registrant now has is to report to the place of employment.

The registrants argue somewhat inconsistently at one point in their brief that the gravamen of the offense was a "failure to leave home" (Reg. Br. 25) and in another that the offense consisted of (Reg. Br. 10) "the refusal to leave the local board and continue on in the process by beginning and completing the link of travel from the place where the local board is located to the place where the civilian work is to be performed." The failure to leave home, is, however, clearly not the offense. The local board's Order, failure to obey which is the basis of these prosecutions, is addressed to the registrant at his mailing address which may be far removed from his home, or the order may be forwarded to him in a distant place. This is by no means an unusual occurrence since conscientious objectors are frequently enrolled in schools and colleges, are traveling when they receive their orders, or have changed their residence after registration. The location of the "home" of the registrant therefore has no necessary significance in resolving the question of where his failure to act occurred. Cf. *United States* v. *Anderson,* 328 U. S. 699, 704–705.

Nor is failure to leave the local board and continue on the journey a definable offense. Manifestly, a registrant has to leave the local board to obey the Order. But he need not necessarily, under present procedures, depart immediately for

his work assignment. He may choose a means of travel which will enable him to spend several hours, or in some cases several days, as he pleases. If in that period of time, he pays a visit, possibly in another judicial district, he has violated no duty under the Act. If, after leaving the local board en route to the place of assignment, he changes his mind, an issue would immediately arise as to the place where the refusal to "proceed" occurred. For instance, a registrant could proceed early to the city of the work assignment and there change his mind; he would not then have complied with the Order of the local board.

Any number of variations can be imagined. The important point is that there is no fixed duty *to proceed* at any certain time and place, and therefore no point at which such a duty can be said to have been definitely breached. The requirement that a registrant "proceed" is merely a method of complying with the duty which *is* fixed, *i. e.,* to report at a certain time and place for work, and it is not until that fixed duty is breached that a violation occurs.

The confusion of the registrants in this respect is probably due to their reliance on discarded procedures whereby reporting to the local board was the first stage of the trip to the public service camp, a journey which took place under definite authority and specific order. Today, the local board's Order does not impose any definite or specific obligation regarding travel to the place of

employment, and none can be created by implication. A plain reading of the Order to Report for Civilian Work makes it clear that the obligation to report to the place of employment arises at the place of employment and not at the locality of the board or the "home" of the registrant.

II

IT IS THE "FAILURE" TO REPORT AT THE PLACE OF EMPLOYMENT WHICH IS PUNISHABLE UNDER THE CURRENT SELECTIVE SERVICE LAW AND CHARGED IN THE INSTANT INDICTMENTS, AND NOT THE "REFUSAL" TO REPORT

The Court of Appeals for the Tenth Circuit in the *Patteson* case seems to have assumed that, even if the registrant's duty (after reporting to the local board) was to report for employment pursuant to the instructions of the local board, that duty was breached when Patteson informed his local board orally and in writing that he would refuse to comply with the order. See No. 704 R. 12: "his refusal to take this step occurred when he notified his local board in Oklahoma that he would go no further." Although the registrants now concede that the oral and written declaration of refusal to the local boards was merely evidence of their future intent in this respect and not the criminal act itself (Reg. Br. 12; see *supra*, pp. 18–19), they nevertheless contend that the "refusal" was implied in the fact that

they took no action after reporting to the local board.

To meet this contention we undertake to show that the crime punishable under the statute is a "failure" to act, not a "refusal", either express or implied, and therefore that the crime is punishable only in the jurisdiction where the required act should have been, but was not, performed.

A. THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT PUNISHES ONE WHO "KNOWINGLY FAILS OR NEGLECTS" TO OBEY THE LOCAL BOARD'S ORDER, AND THAT IS THE CRIME CHARGED BY THESE INDICTMENTS

The statutory source of the obligation imposed on the registrant to obey the order of his local board, first to report to the local board and then to report to the place of employment, is found in Section 6 (j) of the Act (*supra,* p. 3), the Section which also creates the conscientious objector exception to the general obligation of military service and prescribes the procedure to be followed in conscientious objector cases. The Section provides:

> Any person * * * shall * * * if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work con-

> tributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person *who knowingly fails or neglects to obey any such order from his local board* shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. * * * [Emphasis added.]

Section 12 (*supra*, pp. 3–4), referred to in Section 6 (j), is the general penalty provision of the Act, and punishes (50 U. S. C. App. 462 (a)):

> * * * any person * * * who in any manner shall knowingly *fail or neglect or refuse* to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title. * * * [Emphasis added.]

The addition of the word "refuse" in the general penalty clause of the Act (Section 12) cannot alter the specific provision of Section 6 (j) of the Act expressly providing that one who is disobedient to the board's order "shall be deemed, for the purposes of section 12 of this title, *to have knowingly failed or neglected* to perform a duty required of him under this title." [Emphasis added.] Congress could hardly have announced in plainer terms its intent to punish disobedience to an order to report as a "failure" rather than as a "refusal." And even if Section 6 (j) were at all unclear, it has been implemented by a selec-

tive service regulation (32 C. F. R. 1660.30, *supra*, p. 27) providing that "any registrant who knowingly fails or neglects to obey an order from his local board * * * shall be deemed to have knowingly failed or neglected to perform a duty required of him under title I of the Universal Military Training and Service Act, as amended."

As the Court of Appeals for the Third Circuit observes in the *Johnston* and *Sokol* opinion (No. 643 R. 13), "the defendants are not being prosecuted in the western district for their defiance of the board. * * * It was in the eastern district where they failed to appear to do the work assigned to them. And it is this failure which constitutes the offense, if any, in the eastern district." The indictment in the *Sokol* case charges that he (Pet. R. 3–4) "did *knowingly neglect to perform a duty* imposed upon him by the provisions of the said Act in that he failed to report to the Philadelphia State Hospital * * * for assignment to perform civilian work contributing to the maintenance of the national health, safety or interest in lieu of induction; in violation of Title 50 Appx. Secs. 456 (j) and 462." [Emphasis added.] It is apparent that the neglect to report to the Philadelphia State Hospital was an omission to do an act in the district where the Philadelphia State Hospital was located; and the crime charged was committed there, if at all.

Similarly, the *Johnston* indictment charges that he (No. 643 R. 4) "did *knowingly neglect to*

perform a duty imposed upon him by the provision of said Act in that he failed and refused to obey an order of Local Board 87 * * * directing him to report for employment at Norristown State Hospital * * * and to remain employed there for twenty-four consecutive months in violation of Title 50, U. S. C. Appx., Sections 456 and 462, as amended." [Emphasis added.] Here, too, the essential charging language alleges a crime of omission to act (a "neglect to perform a duty") in Norristown, Pennsylvania. The addition of the word "refused" in the specification does not alter the substance of the charging language, and even if it did, it would be discarded as surplusage as the Court of Appeals for the Third Circuit held (No. 643 R. 13). See *Ford* v. *United States*, 273 U. S. 593, 602.

The *Patteson* indictment, after averring that the registrant's local board had (No. 704 R. 1) "issued an order * * * ordering him to report on July 26, 1954, for civilian work * * *", charged that he "did *knowingly and willfully refuse, neglect and fail* to report at the Topeka State Hospital at the time and place so designated in said order." [Emphasis added.] Again, the word "refuse" does not alter the substance of the omission of the duty prescribed by Section 6 (j) of the Act, and to the extent that it charges some crime other than a neglect and failure "to report at the Topeka State Hospital at the time and

place so designated in said order" may also be discarded as surplusage. The substance of the crime charged is failing to report as ordered, and not Patteson's defiant statements to the local board. The crime as defined in the statute was one of omission to act in Kansas rather than of refusing in Oklahoma to perform an act.

B. NEITHER THE EXPRESS OR THE IMPLIED "REFUSAL" OF THE REGISTRANTS, PRIOR TO THE TIME WHEN THEY SHOULD HAVE REPORTED TO THE PLACE OF EMPLOYMENT, CONSTITUTES THE CRIME

Since the crime charged in the instant cases is one of omission rather than commission it is dependent on proof of what the defendant in each case did not do, rather than what he did. The omission to act cannot be made to rest solely on express or implied statements of refusal.

As we have shown, the violation of the second order to report at the place of employment, contained in the registrant's order form, is a command to do an act at the place of employment. *Supra*, pp. 21–27, 31–38, 39–43. Until the time given him by the local board to report has expired, he has not violated the terms of the Order, nor has he failed to act in accordance with the duties presented for I–O registrants in Section 6 (j) of the Act. Whether or not he tells his local board orally or by letter that he will not appear at the place of employment at the prescribed time, the crime of failing to appear is not complete until that time

has come and gone. If a registrant tells his local board on Monday that he will not report to the place of employment on Friday, but on Friday does in fact report, he has committed no crime on Monday. Cf. *United States* v. *Midstate Horticultural Co.*, 306 U. S. 161, 166. The criminal law recognizes no doctrine of anticipatory breach of a prescribed duty while a possibility remains that the duty may be performed. Until the time of final performance arrives and there is an unequivocal failure to act, the crime is not complete.

The *Patteson* opinion does not suggest what the results would have been had that registrant, instead of telling his local board that he would not accept his work assignment, simply done nothing. Under the assumption of the opinion that the crime was committed (No. 704 R. 12) "when he notified his local board in Oklahoma that he would go no further", it is difficult to perceive how the holding would apply where the registrant made no such statement or made equivocal statements not constituting an outright refusal. This illustrates the difficulty of attempting to refashion a crime of omission into a crime involving the doing of an affirmative act. Either there could be no "refusal" at all where the registrant remained silent but did not report, or the court and jury would have to infer a "refusal" in Oklahoma from a silent failure to appear at the Kansas hospital. All such difficulties are avoided once it is accepted that, as we have urged, it is not the act of defying

the board that is punishable and fixes the situs of the crime—it is the failure to report to the place of employment as ordered.

The registrants argue a somewhat different theory to support their contention that the statute punishes a "refusal" and not a "failure" to act. They contend that their failure to appear at the place of employment was, in itself, a constructive or implied refusal to proceed further after reporting to the board and concede, contrary to the *Patteson* analysis, that (Reg. Br. 32) "the making of the statement of refusal by the registrant is mere surplusage". They urge that a refusal may be implied in the fact that they simply failed to act. As suggested above, this is simply an awkward attempt to change what is essentially a crime of omission into a crime of commission. The registrants do not indicate at what point or where such an implied refusal occurred, or would occur in any other case, or what would have been the situation if the registrant, after reporting to the board, had gone to a third district and had there "refused" to proceed further.

This confusion results from their assumption, which we have already discussed (*supra*, pp. 31–38), that there is a duty to commence the journey to the place of employment at a fixed time, and that this definite obligation marks the point where and the time when a violation of the local board's Order occurs. But, as we have demonstrated, that point cannot be fixed under present procedures

which neither prescribe the hour or the mode of travel, but require only that the registrant report at the place of employment at a certain time. The crime does not occur when the registrant refuses to board a train, but only when he fails to appear at the point of destination. Until the hour for reporting arrives, no crime has been committed.

C. UNDER THE GENERAL RULE APPLIED IN THE ABSENCE OF A SPECIAL VENUE STATUTE, A CRIME INVOLVING THE FAILURE TO DO AN ACT IS COMMITTED WHERE THE ACT SHOULD HAVE BEEN DONE

Since, as we have shown, the statute (*i. e.,* Sections 6 (j) and 12, read together) imposes its criminal sanctions on the I–O registrant "who knowingly fails or neglects to obey any such order from his local board," and that is the crime charged here, the place where the act should have been performed fixes the situs of the crime. This Court has so held in other instances where the gist of the crime was an omission to do an act required by law to be done in a place other than the residence of the accused. In *Rumely* v. *McCarthy,* 250 U. S. 283, the New York defendant was charged with failing, neglecting, and omitting to report enemy property and credits under the Trading with the Enemy Act of October 6, 1917, c. 106, 40 Stat. 411, with the Alien Property Custodian in the District of Columbia. The Court held that the case was properly triable in the District of Columbia since "the duty imposed

by the statute to make report to the Alien Property Custodian involved the duty to make such report in the District of Columbia, and failure to make it was an offense against the United States committed in that District." 250 U. S. 283, 289.

A similar result was reached in *United States* v. *Lombardo*, 241 U. S. 73, where a demurrer to an indictment in the Western District of Washington, charging the defendant with failure to file a statement in writing with the Commissioner General of Immigration in the District of Columbia as required by the White Slave Traffic Act of June 25, 1910, c. 395, 36 Stat. 825, 826, was sustained on venue grounds. The Court of Appeals for the Second Circuit has applied the same general rule of venue under similar circumstances. *New York Central & H. R. R. Co.* v. *United States*, 166 Fed. 267 (C. A. 2) (indictment charging New York railroad company with "willfully failing" to file rate and charge schedule with the Interstate Commerce Commission in the District of Columbia properly triable there rather than in New York). See also *United States* v. *Commerford*, 64 F. 2d 28, 32 (C. A. 2), certiorari denied, 289 U. S. 759; *State* v. *Peabody*, 25 R. I. 544, 56 Atl. 1028. The rule has also been applied in selective service cases (*Jones* v. *Pescor*, 169 F. 2d 853, 855 (C. A. 8); *Humes* v. *Pescor*, 148 F. 2d 127, 128 (C. A. 8); *United States* v. *Van Den Berg*, 139 F. 2d 654, 656 (C. A. 7); *United*

States v. *Sutter*, 127 F. Supp. 109, 115–116 (S. D. Cal.)), and was adverted to with apparent approval in the opinion of this Court in *United States* v. *Anderson*, 328 U. S. 699, 705, fn. 14.

The registrants seek to distinguish these cases on the basis that (Reg. Br. 26–27) each "involved orders issued by a tribunal in the district where the prosecution was brought and not orders issued by a tribunal outside the district * * *." However, aside from the fact that the cases stating the rule all involve a failure to obey a duty imposed by statute and not by a government agency, they do not stand for the proposition that, where an omission to act is the crime, venue lies where the duty to act originated; they hold that venue lies "where the act should have been performed." *United States* v. *Anderson*, 328 U. S. 699, 705, fn. 14.

Moreover, while the Government has brought these prosecutions in the district of the place of employment because it believed that this was the only district where the crime was committed and therefore the only district in which, under the Constitution, the prosecution could be brought, it should be noted that dismissal of these indictments—which, as we have shown, clearly charged failure to report for employment—can be sustained only by a holding that the district where the work is to be performed has *nothing* to do with the crime. The registrants' theory, at most, would support the view that the crime of failing

to report for employment began in the district of the local board and was completed in the district of employment. On this basis, while a court could then properly transfer the case to the district of the local board under Rule 21 (b), F. R. Crim. P., it would not be justified in dismissing the indictment in the district where the offense was completed since 18 U. S. C. 3237 declares:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed. * * *[14]

To sustain dismissal of the indictment, the registrants have to argue that the district in which the hospital is located has no connection at all with the crime with which they have been charged. But, as we have pointed out, since that crime is the "failure" to report for employment and not the "refusal" to obey the local board's order, it is difficult to believe that the offense was neither "begun", "continued", nor "completed" in the district of the ordered employment. Under 18 U. S. C. 3237, it is not enough to show that the registrants took some action, or should have taken

[14] It is under this section that indictments for tax evasion may be brought either where the taxpayer prepared his returns and forwarded them for filing, or in the district where they were filed.

some action, in the district of the local board; they have to show, as they cannot, that the crime was fully completed in that district.

III

NEITHER THE CONSTITUTION NOR A POLICY OF CONVENIENCE TO THE ACCUSED REQUIRE THAT THE VENUE BE LAID IN A JURISDICTION OTHER THAN THAT WHERE THE FAILURE TO REPORT OCCURRED

The registrants' invocation (Reg. Br. 14–17, 35) of the constitutional right of an accused to a trial "in the State where the said Crimes shall have been committed" (Art. III, Sec. 2, U. S. Constit.) and "to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law" (Amendment VI, U. S. Constit.) leads only to the proposition that a crime must be prosecuted where committed—a principle in which we of course concur. But the Constitution does not tell where a crime is committed and certainly it does not lend support to a ruling that a prosecution for failure to report to an employer in State X must be prosecuted in State Y where the registrant lives and where his local board is located—and this is essentially the registrants' contention. The Constitution neither demands that a defendant be prosecuted in the place where he resides (*In re Palliser*, 136 U. S. 257) or the place where he was when the crime was committed. *Salinger*

v. *Loisel*, 265 U. S. 224, 235. As this Court said in *United States* v. *Anderson*, 328 U. S. 699, 704–705, with respect to the venue requirement of the Sixth Amendment:

> The constitutional specification is geographic; and the geography prescribed is the district or districts within which the offense is committed. This may or may not be the place where the defendant resides; where the draft board is located; or where the duty violated would be performed, if performed in full. The places of residence, of the draft board's location, of final and complete performance, all may be situated in districts different from that where the criminal act is done. When they so differ, it is the latter, not any of the former, which determines the jurisdiction.

While the exact situation presented by the instant cases was left open in *Anderson*, its rationale would appear to require that, where a registrant has appeared before his local board and has been given a work assignment, the failure to perform the duty required by the Act occurs at the place "where the duty violated would be performed, if performed in full." See also *supra*, pp. 46–50.

The registrants also argue for the application in these cases of (Reg. Br. 30) "a rule of convenience". They say that "all of the witnesses in prosecutions of these cases usually come from the district where the local board is located and the defendant resides" (Reg. Br. 30; see also Reg. Br.

36, 37–38). However, a general rule of venue for selective service cases could hardly be made to depend upon the facts peculiar to these cases. As the Court said in addressing itself to a similar contention in *United States* v. *Lombardo*, 241 U. S. 73, "we hesitate, in order to accommodate the venue of a particular offense, to introduce such confusion". Cases may arise where the draft board is in a jurisdiction different from the residence of the registrant, and where his witnesses are located in the latter place. Other cases may involve the disputed question of whether the registrant did in fact fail to report to the employer, where his witnesses might well come from the place of employment. In other cases where a registrant reports to his local board in State A, and then goes to State B, instead of reporting for employment in State C, his witnesses may be found in State B. Much would depend, in any particular case, on the nature of the defense, *i. e.*, that the defendant did actually report, or that he was improperly classified, or that he was never ordered to report at a specific time, etc. While we concede that there are usually practical advantages for both sides in bringing a prosecution in the district where the draft board is located, the advantage to the defendant of a trial there is certainly not inevitable.

In any event, the issue of venue, which is essentially a problem of analyzing the nature of the

crime itself, is not determinable in this instance by the convenience of the litigants. As we have shown, the crime was wholly committed in the district of the ordered employment. There is no room for construing the Universal Military Training and Service Act to establish this crime as committed in the local board's district. For this reason, cases like *United States* v. *Johnson*, 323 U. S. 273, which interpret other statutes to provide crimes wholly committed at the place of the defendant's residence or presence, are inapposite.[15]

The registrants here envisage horrendous results if some other registrant is ordered and fails to report to employment in such distant places as Japan or Korea. The short answer to this is that I–O registrants are not ordered against their will to work outside the continental United States. In the few instances where such orders have been issued by the local boards, the registrant had volunteered for such assignment, usually under the auspices of denominations such as the Quakers and Mennonites, and in most cases the registrant is already residing in the country involved or the religious organization furnishes his transportation to the foreign country. As a mat-

[15] *United States* v. *Wilson*, and *United States* v. *Purchasing Corporation of America*, 344 U. S. 923, are also of this type.

ter of fact, registrants are not usually ordered even to leave their own state.[16]

All of these considerations converge to the conclusion that the crimes as defined in the Act and as charged in the indictments were committed in the place where, but for the criminal failure, the act commanded should and would have been performed. This conclusion is supported, not only by the text of the Act and the regulations which define the obligations of the I-O registrant, but also by analysis of the nature of the omission which is the basis of the crimes charged in each case. The failure to report for work occurs in the place where the work should be performed.

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[16] An exception to this general policy is involved in the case of Oklahoma registrants. Since Oklahoma has a constitutional requirement that all persons applying for state employment sign a loyalty oath including an oath to bear arms, it is impossible to assign such work to I–O registrants and they are sent to the neighboring state of Kansas. This is the situation in the *Patteson* case.

The problems of district-to-district assignment in *Johnston* and *Sokol* arise only in such states as Pennsylvania having more than one judicial district.

CONCLUSION

For the foregoing reasons, we submit that the judgments of the Court of Appeals for the Third Circuit in No. 643 should be affirmed, and the judgment of the Court of Appeals for the Tenth Circuit in No. 704 should be reversed.

SIMON E. SOBELOFF,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys.

APRIL 1956.

APPENDIX

SELECTIVE SERVICE SYSTEM

ORDER TO REPORT FOR CIVILIAN WORK AND STATEMENT OF EMPLOYER

Local Board No. 87
Greer Building
NOV 16 1953
24 N. Mercer Street
New Castle, Pa.

November 16, 1953
(Date of mailing)

To PAUL DEEMER JOHNSTON 36 87 33 75
(First name) (Middle name) (Last name) (Selective Service Number)

Mailing address 508 Court St. New Castle Pennsylvania
(Street and number) (City) (State)

Having been found to be acceptable for civilian work contributing to the maintenance of the national health, safety, or interest you have been assigned to Hospital work

located at Norristown State Hospital, Stanbridge and Sterigere St.

Norristown, Pennsylvania

You are ordered to report to the local board named above at 10a. m. (hour) on the 27th day of November, 195 3 where you will be given instructions to proceed to the place of employment.

You are ordered to report for employment pursuant to the instructions of the local board, to remain in employment for twenty-four (24) consecutive months or until such time as you are released or transferred by proper authority.

You will be instructed as to your duties at the place of employment.

Failure to report at the hour and on the day named in this order, or to proceed to the place of employment pursuant to instructions, or to remain in this employment the specified time will constitute a violation of the Universal Military Training and Service Act, as amended, which is punishable by fine or imprisonment or both.

Bryan McKeown
(Clerk or Member of the Local Board)

STATEMENT OF EMPLOYER

The registrant identified above reported for civilian work on the ____ day of ____, 195 . to

Name of Employer _____

Address of Employer _____
(Street address) (City) (Zone) (State)

11/30/53

FAILED TO REPORT

J. R. Russell
(Signature of employer or agent)

Personnel Director
(Title)

SSS Form No. 153 (See instructions on reverse side)

Office - Supreme Court, U.S.
FILED
FEB 17 1966
JOHN F. DAVIS, Clerk

BRIEF
SUPREME COURT U.S.
No. 204

In the Supreme Court of the United States

October Term, 1965

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT A. FLEISCHER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

DUDLEY A. PATTESON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, affirming the judgment of the United States District Court for the District of Kansas, dismissing the indictment for lack of venue.

OPINIONS BELOW

The opinion of the court of appeals (App. *infra*, pp. 1a-6a) has not yet been reported. The opinion of the district court (R. 6-8) is reported at 132 F. Supp. 67.

JURISDICTION

The judgment of the court of appeals was entered January 19, 1956 (App. *infra*, p. 7a). The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether venue of the crime of failing or neglecting to obey an order of a local draft board to a conscientious objector to report for civilian work pursuant to Section 6(j) of the Universal Military Training and Service Act lies in the district where the work was to be performed or in the district where the registrant told his local board that he would refuse to report.

STATUTE INVOLVED

The pertinent portions of the Universal Military Training and Service Act, 62 Stat. 604, as amended, 65 Stat. 75, provide:

Section 6(j) of the Act (50 U.S.C. App. 456(j)):

> * * * Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, * * * if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any

such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. * * *

Section 12(a) of the Act (50 U.S.C. App. 462(a)):

* * * Any * * * person * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

STATEMENT

An indictment returned in the United States District Court for the District of Kansas charged that petitioner, having been classified I-O [conscientious objector opposed to non-combatant service] by his local board in Oklahoma, had been mailed an order directing him to report on July 26, 1954, for civilian work, and that he knowingly and willfully refused, neglected and failed to report at the Topeka State Hospital [in Kansas] at the time and place designated in that order (R. 1).

The Kansas district court *sua sponte* ordered the cause transferred under Rule 21(b), F. R. Crim. P.[1] to the Western District of Oklahoma, where defendant resided and where his draft board was located (R. 2). That court, however, retransferred the cause to the Kansas court on the ground that the jurisdiction of the offense was solely in Kansas (R. 3).

Respondent then moved in the Kansas court to dismiss the indictment for lack of venue. He alleged that he resided and that his draft board was located in Oklahoma; that, when he was finally ordered by his draft board to perform work at the Topeka State Hospital at Topeka, Kansas, he personally notified the board in Oklahoma that he would refuse to accept such employment; and that he never left the state of Oklahoma to report for the assigned work. Under these circumstances, he argued, the refusal to report to the hospital was an act committed in the Western District of Oklahoma, and not in Kansas (R. 3-4).

The Kansas district court dismissed the indictment, holding that venue of the crime was in Oklahoma rather than in Kansas (R. 6-9). Its order was affirmed on appeal (App. *infra*, p. 7a).

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[1] That rule provides:

"The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

REASONS FOR GRANTING THE WRIT

The opinion of the court below is in direct conflict with that of the Court of Appeals for the Third Circuit in *United States* v. *Johnston*, decided December 1, 1955, now before this Court on petition for a writ of certiorari (No. 643, this Term). The Third Circuit—applying the general rule that where there is a legal duty to act and the failure to do that act is a criminal offense courts consider the criminal offense to take place where the defendant failed to perform that which the law required of him—has held that the offense charged in this type of case is failure to report for civilian work, an offense which occurs at the place where the work is to be performed. In the instant case, the Tenth Circuit has held that no offense is committed at the place where the work was to be performed; but that the offense is completed when a defendant notifies his local draft board that he will not report for the work assigned.

This conflict of circuits is one which should be resolved in the interests of orderly administration of the selective service laws in this field. As the history of the transfer and retransfer of this case illustrates, there have been differences of opinion among district courts on this issue. See also *United States* v. *Sutter*, 127 F. Supp. 109 (S. D. Cal.). In view of the present conflict, the doubt as to the district in which to bring this type of prosecution remains unresolved. At present, about twenty-five prosecutions have been held in abeyance pending determination of the issue. In addition, the question is important for future cases of the same type which may arise.

Despite the manifest practical advantages of bringing a prosecution in the district where the draft board is located, it has been the view of the Department of Justice that prosecution had to be brought in the district where the work was to be performed. As this Court said in *United States* v. *Anderson*, 328 U. S. 699, 704-705, with respect to the venue requirement of the Sixth Amendment:

> The constitutional specification is geographic; and the geography prescribed is the district or districts within which the offense is committed. This may or may not be the place where the defendant resides; where the draft board is located; or where the duty violated would be performed, if performed in full. The places of residence, of the draft board's location, of final and complete performance, all may be situated in districts different from that where the criminal act is done. When they so differ, it is the latter, not any of the former, which determines the jurisdiction.

While the exact situation presented by these cases was left open in the *Anderson* decision, the rationale of *Anderson* would appear to require that, where a registrant has appeared before his local board and has been given a work assignment, the failure to perform the duty required by the Act occurs at the place where the work is to be performed even though the registrant has announced that he will not comply with the order. Section 6(j) of the Universal Military Training and Serv-

ice Act speaks of one "who knowingly fails or neglects" to obey an order to report for civilian work; the word "refuse" does not appear, although Section 12(a) provides for the punishment of one "who in any manner shall knowingly fail or neglect or refuse" to perform a duty required under the Act. Failure or neglect to obey an order to report for civilian work does not occur until the work is to begin, and then it occurs at the place the work is to be performed.

More basic than the absence of the word "refuse" or "refusal" in Section 6(j), is the fact that this indictment charged a failure to report for work as ordered. There is no violation of the duty to report until the defendant fails to appear at the place of work. If a registrant fails to report to his board to receive his work assignment, there would then be a violation of a duty to report which would occur in the district where the draft board is located. However, in a prosecution for violation of that duty, the registrant would not be in a position to challenge the draft board classification since he would not have completed the administrative process. *Falbo* v. *United States*, 320 U.S. 549. Where he does report, receives his assignment and says nothing, but then does not appear at the place of work, the offense of failing or neglecting, or even refusing, to report for work clearly occurs only at the place of assignment. Nor should the situation be altered where the registrant tells his draft board that he will not appear on the day specified. If, after telling his draft

board he will not appear, he changes his mind and reports, he has not committed the offense of failing or refusing to report for work. The violation of the duty to report for work does not occur until he fails to appear as ordered; his statement to the draft board is merely a statement of future intention.

The present situation with respect to civilian work is different from that prevailing during World War II when civilian camps were utilized. Then, the regulations provided that the registrant was to report to the local board for transportation to a camp, and the board was to furnish him with government travel requests (Selective Service Regulations 652.12, 7 Fed. Reg. 112). When, therefore, the registrant reported to the board and refused to do more, his act was the same as refusing to submit to induction, and he could properly be prosecuted in the district of refusal. *Dodez* v. *United States*, 329 U. S. 338. That case, however, does not as the court below thought (App. p. 5a) control the present situation where the registrant is expected to make his own arrangements to report to the place assigned; and is charged with a failure to report as ordered. Under these circumstances, the duty in question is to report for work, and the violation therefore takes place where the work was to be performed.

CONCLUSION

In view of the conflict between the decision below and that of the Third Circuit in *United States* v. *Johnston*, No. 643, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

FEBRUARY 1956.

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5193—November Term, 1955

Appeal from the United States District Court for the District of Kansas

UNITED STATES OF AMERICA, APPELLANT

v.

DUDLEY A. PATTESON, APPELLEE

(January 19, 1956)

Selby S. Soward (William C. Farmer, U. S. Attorney, was with him on the brief), for Appellant;

Hayden C. Covington, for Appellee.

Before MURRAH, and PICKETT, Circuit Judges, and RICE, District Judge.

PICKETT, Circuit Judge.

The question presented by this appeal is one of jurisdiction in a prosecution for violation of the provisions of the Universal Military Traning and Service Act. (50 U.S.C.A. App. Sec. 451 et seq.) The defendant Patteson, a resident of Oklahoma City, Oklahoma, registered with the local Selective Service Board and was classified 1-0. This classification is one designated for those who are conscientiously opposed to participation in both com-

batant and noncombatant training and service in the armed forces of the United States. 50 U.S.C.A. App. Sec. 456(j). In lieu of induction, the local board ordered Patteson to report to it on July 26, 1954, to receive instructions for civilian work contributing to the maintenance of the national health, safety or interest at the Topeka State Hospital in Topeka, Kansas. In compliance with the order, he reported to the local board and there notified the board that he would not proceed to Topeka for the performance of the required civilian work. He never left the State of Oklahoma.

On October 7, 1954, the defendant was indicted in the United States District Court for the District of Kansas for violation of 50 U.S.C.A. Sec. 462. The indictment charged that the defendant did knowingly and willfully refuse, neglect and fail to report to the Topeka Hospital as ordered by the local board. The District Court dismissed the indictment on the ground that the offense was not committed in Kansas. 132 F. Supp. 67. The United States has appealed.

Section 12 of the Act (50 U.S.C.A. Sec. 462(a)) provides that any person "charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment." The Sixth Amend-

ment to the Constitution of the United States requires that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial "by an impartial jury of the State and district wherein the crime shall have been committed, * * *." The question narrows itself to that of where was the crime committed. The United States argues that the order of the local board required Patteson to report at the Topeka Hospital; that his omission or failure to report there was the act which constituted the violation; and that the crime was committed in Kansas by this omission or failure. It relies upon decisions which uphold jurisdiction of prosecutions in the districts where a statute requires an act to be done.[2] Generally, these cases hold that when an omission or failure to act constitutes a crime, the jurisdiction of a prosecution for a violation is in the district where the act should have been performed, even though the person charged was not physically present in that district at the time of the omission or failure. The Third Circuit in United States v. Johnston, —— F. 2d ——, adopted this analogy and held in a case similar to the one before this court that jurisdiction was at the place where the conscientious objector was ordered to report. We do not think that the offense was an act of omission or an offense of misfeasance or malfeasance which would pass from

[2] See Rumely v. McCarthy, 250 U.S. 283; United States v. Lombardo, 241 U.S. 73; United States v. Commerford, 2 Cir., 64 F. 2d 28, cert. den. 289 U.S. 759; N. Y. Central and H.R.R. Co. v. United States, 2 Cir., 166 F. 267; State v. Peabody, 25 R.I. 54, 56 Atl. 1028.

one jurisdiction to another, but a refusal to take a positive step in the process of induction or assignment to civilian work and that this refusal was in Oklahoma.

As is pointed out in United States v. Anderson, 328 U. S. 699, "The constitutional specification is geographic; and the geography prescribed in the district or districts within which the offense is committed. This may or may not be the place where the defendant resides; where the draft board is located; or where the duty violated would be performed, if performed in full. The places of residence, of the draft board's location, of final and complete performance, all may be situated in districts different from that where the criminal act is done. When they so differ, it is the latter, not any of the former, which determines the jurisdiction." (footnotes omitted).

So far as compliance with the requirements of the Act or the regulations is concerned, the conscientious objector is in no different position than any other person subject to its provisions. Induction into the service is the end product of submission to the Selective Service process and compliance with the orders of the local board. Billings v. Truesdale, 321 U. S. 542. Induction is brought about by a continuous process of steps beginning with registration, and it ends when the registrant is accepted into the military service or enters into civilian work. A wilful refusal of those affected by the Act to take any one of the necessary steps constitutes a violation. Gibson v. United States, 329 U. S. 338; Billings v. Truesdale, supra; Falbo

v. United States, 320 U. S. 549; Hudson v. United States, 10 Cir., 157 F. 2d 782, cert. den. 329 U. S. 813; Shigeru Fujii v. United States, 10 Cir., 148 F. 2d 298, cert. den. 325 U. S. 868; Berman v. United States, 9 Cir., 156 F. 2d 377, cert. den. 329 U. S. 795.

Patteson had taken all the required steps in the process of induction up to compliance with the local board's order which required him to report to it for assignment to Topeka, Kansas for civilian work in lieu of induction into the armed forces. The duty required of him by the order was to proceed to Topeka. This was no more than a necessary intermediate step in the continuous process, the ultimate purpose of which was to get Patteson into civilian work. Falbo v. United States, supra. It seems to us quite clear that his refusal to take this step occurred when he notified his local board in Oklahoma that he would go no further. Had he proceeded to Topeka and then refused to do the assigned work, a separate offense would have been committed. Gibson v. United States, supra; United States v. Anderson, supra. In Dodez v. United States, 329 U. S. 338, and Jeffries v. United States, 10 Cir., 169 F. 2d 86, prosecutions were had in the district where the board was located when the registrants refused to report for work of national importance after being ordered to do so, and the jurisdiction of the courts was not questioned.[3]

[3] In the Jeffries Case, the court said:

"Clearly, the duty of Jeffries to report embraced more than putting in an appearance at the time and place designated in

Jurisdiction as contended for by the United States might require a conscientious objector who refused to obey the local board's order to go to a distant state or territory of the United States, or even outside the continental limits of the United States, where he had never been, to defend a prosecution for an act, that is a refusal to proceed, which occurred in his home district. This, of course, would not determine jurisdiction if the crime was actually committed elsewhere, but as was said in United States v. Johnson, 323 U. S. 273, "Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the Constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."

Affirmed.

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the order. It included a willingness to be assigned to work of national importance under civilian direction and to go to the camp to which he had been assigned.

"The appearance of Jeffries at the office of the Local Board at the time indicated in the order with the intent and purpose not to accept assignment to work of national importance and not to go to the camp to which he had been assigned was as much a noncompliance with the order as if he had not appeared at the office of the Local Board."

JUDGMENT

Forty-third Day, November Term, Thursday, January 19th, 1956.

Before Honorable Alfred P. Murrah and Honorable John C. Pickett, Circuit Judges, and Honorable Eugene Rice, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

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